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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 880

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

v.

RONALD HOWARD POLK and
GEORGE ANTHONY GREGG,
Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of California

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Petition for Writ of Certiorari to the Supreme Court of the State of California

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California, entered in the above entitled case on October 20, 1965.

CITATIONS TO OPINION BELOW

The opinion of the California Supreme Court, printed in Appendix A hereto, is reported in 63 A.C. 461, 406 P.2d 641, 47 Cal. Rptr. 1.

The opinion of the California Supreme Court, printed in Appendix B hereto, entered prior to the granting of a petition for rehearing is reported in 62 A.C. 951, 402 P.2d 845, 44 Cal. Rptr. 773.

The opinion of said court, printed in Appendix C hereto, issued on the first appeal in the case is re-

ported in *People* v. *Polk,* 61 Cal.2d 217, 390 P.2d 641, 37 Cal. Rptr. 753.

JURISDICTION

The jurisdiction of the court is invoked under 28 U.S.C. section 1257(3) upon the ground that a right has been specially set up and granted under the Constitution of the United States.

QUESTIONS PRESENTED

1. Does the prospective operation of *Escobedo* v. *Illinois,* 378 U.S. 478, 12 L.Ed.2d 977, 84 S.Ct. 1758, extend to a final state court conviction in which the time to petition this Court for certiorari had not expired on the date *Escobedo* was decided although no petition to review said state court conviction was presented to this Court?

2. Is a free and voluntary confession by a defendant, who has neither requested nor been refused counsel, inadmissible in a State criminal trial by reason of the Constitution of the United States solely because the investigating officers did not advise him of his right to consult with counsel and his right to remain silent?

3. Is a free and voluntary confession by a defendant, who has neither requested nor been refused counsel, inadmissible in a State criminal trial by reason of the Constitution of the United States because the prosecution did not establish that the defendant at the

time of the questioning made a knowing and intelligent waiver of both (a) his right to consult with counsel and (b) his right to remain silent?

4. If so, is such a free and voluntary confession inadmissible where the record does not affirmatively establish that the defendant was not advised of his rights and did not waive them?

STATUTES INVOLVED

The federal statute involved is 28 U.S.C. section 1257 insofar as it uses the terms final judgments or decrees (printed in Appendix D).

Rule 22(1) of the rules of this Court is involved as to petitioning for a writ of certiorari within 90 days after entry of judgment (printed in Appendix E).

Rules 24 and 25 of the California Rules of Court are involved as to finality of judgments and the issuance of the remittitur to the lower court (printed in Appendix F).

STATEMENT

A. Statement of the Case

Respondents Polk and Gregg were found guilty in the Superior Court of the State of California in and for the County of Tulare of murder in the first degree by jury verdict. The same jury fixed the penalty at death. Judgment of the trial court was entered January 14, 1963 (CT 96).

There was an automatic appeal to the California Supreme Court. The judgment was affirmed as to guilt

and reversed on the penalty issue on March 31, 1964, the court stating as follows:

> "It Is Ordered, Adjudged, and Decreed by the Court that the judgments of the Superior Court in and for the County of Tulare in the above entitled cause, be and the same as to Polk and Gregg are hereby reversed insofar as they relate to the penalty for first degree murder. In all other respects the judgments as to Polk and Gregg are affirmed." (CT 1.) (*People* v. *Polk*, 61 Cal.2d 217, 234–235.)

The California Supreme Court denied a rehearing on April 29, 1964. The remittitur of the court issued on May 1, 1964 (CT 1).

No petition for writ of certiorari was filed with this Court.

On May 8, 1964, the Superior Court of Tulare County ordered respondents' return to the jurisdiction of that court for retrial on the penalty issue (CT 2). The public defender's office was appointed to represent respondents (CT 4). A motion for the public defender to withdraw from the case due to a conflict of interest was granted (CT 4, 10). On May 22, 1964, private counsel were appointed to represent respondents (CT 10, 11). On May 25, 1964, pursuant to the agreement of all parties concerned, trial was set for July 20, 1964.

Upon retrial the jury again fixed the penalty at death for each respondent. On automatic appeal the California Supreme Court filed its decision June 18, 1965, affirming the judgments as to guilt and revers-

ing the judgments imposing the death penalty (62 A.C. 951, 44 Cal.Rptr. 773, 402 P.2d 845).

A rehearing was granted July 14, 1965, upon petition of the People of the State of California. The decision after rehearing entered October 20, 1965, reversed the judgments as to both guilt and penalty. This decision is reported in 63 A.C. 461, and is the decision sought to be reversed by this petition.

B. Statement of Facts

THE KILLING OF FAMBRO

William Fambro, during March of 1962, was in the naval service stationed at Bremerton, Washington (RT 393). During the last part of March 1962, he was on leave with his family at Norwalk, California. He was due to report to his ship at 8 a.m. on April 1, 1962 (RT 394).

The body of Fambro was found at the foot of an embankment on Highway 65 in Tulare County at 5:45 p.m. on April 2, 1962 (RT 377–378). Footprints at the scene indicated that two persons had tossed the body down the embankment (RT 378). The uniform was fairly clean except for some dirt in the hip area. The shoes were clean and without scuff marks (RT 381). Fambro's wallet was not found (RT 449).

A post-mortem examination was conducted at 10 p.m. on April 2, 1962 (RT 478). The pathologist observed considerable discoloration in the head and neck area. There was considerable bloating (RT 485). The mouth, nostrils and eyes were filled with maggots.

There were three bullet wounds in the body. Two bullets entered the chest area, one pierced the heart and lodged in the chest cavity. The other penetrated the left lobe of the liver and lodged in the vertebral column (RT 479). The third bullet wound was in the palm of the right hand below the base of the thumb. This wound was superficial (RT 479).

The bullet which pierced the heart was the fatal wound in the opinion of the pathologist (RT 479), but death was not necessarily instantaneous and a person receiving such a wound "might live for several minutes, possibly two minutes" (RT 480).

The fly of Fambro's trouser's had been ripped open from left to right and there was a slight tear in the right corner of the fly on the trouser side (RT 389, 482). Bloodstains were observed on the trousers in the fly area (RT 391) and on Fambro's undershorts (RT 393).

The penis of Fambro had been amputated (RT 482). The pathologist testified that there was minimal bleeding at the site of the amputation and that the bleeding was localized around the pubic region, indicating that the amputation was accomplished while the victim was lying flat (RT 482). In the pathologist's opinion, Fambro was probably dying at the time of the amputation (RT 483). The time of death was estimated to have occurred anywhere between 48 to 72 hours prior to the post-mortem examination at 10 p.m. on April 2, 1962.

The victim's watch was running at the time of post-mortem examination at about 9:50 p.m. on April 2, 1962, and indicated the correct time (RT 407). The watch did not run down until 7:53 a.m. on April 3, 1962 (RT 497). Tests showed the watch had approximately a 48-hour period of operation (RT 497, 956).

ADMISSIONS OF RESPONDENT GREGG

Respondent Gregg gave a statement to police officers on June 2, 1962, at the Porterville Sheriff's Substation. The statement was tape recorded and parts of it were played to the jury (RT 448). It is summarized as follows: Respondent Gregg, Avery Matthews and Jack Blonde left Los Angeles around April 1, 1962, in a stolen 1952 Chevrolet (RT 450). The purpose of the trip was to commit robberies (RT 453).

The sailor Fambro was picked up on the outskirts of Bakersfield at approximately 11:30 p.m. (RT 449, 456). At this time Matthews was driving and respondent Gregg and Jack Blonde were in the backseat (RT 456). Fambro got in the backseat between these two. As the car proceeded up the highway, Blonde asked Fambro for his money (RT 452). A struggle ensued and the car was turned off the road and stopped. As to the actual killing and mutilation of Fambro, respondent Gregg stated as follows:

> "Answer (By George Anthony Gregg): Well, on April the 1st, that night at exactly 11:30, we picked up the sailor, and we drove down the road, we turned off and the sailor was putting up a fight. In the back seat was me and Jack Blonde, and I

opened the door, we throw him out on the ground and I held his hands. Jack kneeled down by him and the gun pointed toward his ribs, and Avery Matthews pulled his pants down and his shorts and begin to cut—cut him, and the sailor began to scream, and one hand got away from me and pushed Jack, and I grabbed that hand and put it under my knees and put my hand across his mouth, and Avery Matthews therefore cut William T. *Famba* with a knife, cut his penis out and hold it up in her hand and then beginning to laugh and she began to say she get her kicks out of cutting fellows' penis out.

"An Jack pulled the trigger three times but the first shot *Famba* throwed his hand up to avoid the shot. It was too late because he pulled the trigger two more times, and I exactly got out and asked Jack why he did he kill the sailor boy, and we drag him about exactly 10 or 12-feet from the car, which had been stolen, was a '52 red Chevrolet, two-door sedan. I exactly don't know what the license number was." (RT 449–450.)

Gregg stated that during the amputation, Fambro screamed, "and the last word he said was have mercy on his soul, that is the last thing I heard him say" (RT 460).

The testimony of respondent Gregg given at the previous trial was introduced into evidence and read to the jury in the present proceedings (RT 568). This testimony was limited to respondent Gregg (RT 570). This testimony is summarized in the Court's former opinion as follows:

"Gregg testified that he and Polk were alone in the car when they saw Fambro, and that Polk said, 'That's one we can get right there.' Gregg further testified that there was no argument between them and Fambro but that after they turned off Highway 99 he demanded Fambro's wallet; that Fambro complied, and Polk then shot him without warning; and that Polk amputated Fambro's penis as they were dragging him from the car." (61 Cal.2d 217, 225.)

The testimony at the former trial of respondent Gregg also corroborated the testimony pertaining to the robbery and the assault upon witness Schill and also corroborated Blonde's testimony concerning the other robberies on the San Francisco trip.

ADMISSIONS OF RESPONDENT POLK

The testimony of respondent Polk given at the former trial was introduced into evidence and read to the jury in the present proceeding. This testimony was admitted only as to respondent Polk (RT 636). His testimony concerning the Fambro murder is summarized in the Court's former opinion as follows:

"As to the events surrounding the murder, Polk testified that he and Gregg met at a Los Angeles restaurant on the evening of March 30 or 31, and agreed that they needed money. Polk suggested that they 'pull some jobs together'; Gregg asked, 'What kind of jobs?' and Polk replied, 'Service stations and liquor stores.' Gregg agreed, and Polk went out and stole a car and obtained a gun from his apartment. As he drove away with Gregg

he said that they were not going to pull any 'jobs' around Los Angeles because it was 'too hot' there but that they would head north to do so. Polk then testified that they 'looked over a few places in San Fernando but the police was too hot out there'; that they then 'cased out a few places in Bakersfield that we thought we could hit about closing time,' but found no satisfactory victims; that they continued north on Highway 99 looking for something to 'knock over' when they saw Fambro hitchhiking and stopped to pick him up. Polk's story was that Gregg and Fambro began arguing about how long it took Gregg to become a sergeant in the service; that Fambro then drew Polk into the argument and called him dirty names; that Polk stopped the car, began fighting with Fambro in the back seat, then pulled out his gun and shot Fambro three times. Polk further testified that as they were dragging Fambro out of the car Gregg took Fambro's wallet and amputated his penis." (61 Cal.2d 217, 224–225.)

The testimony of respondent Polk corroborated the testimony pertaining to the robbery and the assault upon witness Schill and also corroborated Blonde's testimony concerning the other robberies on the San Francisco trip.

PSYCHIATRIC TESTIMONY

Dr. Ilse Collet examined respondent Polk on three occasions and respondent Gregg on two occasions (RT 647, 656). In the Doctor's opinion, respondent Gregg was ". . . of normal intelligence, more on the dull normal side, but certainly not below. He was not men-

tally retarded." (RT 658.) In the Doctor's opinion respondent Polk's intelligence was above normal (RT 670).

The Doctor diagnosed both respondents as sociopathic individuals (RT 663, 670). Both were homosexuals (RT 663, 670). Polk was considered a leader, whereas Gregg was considered a follower. On the question of the probable rehabilitation of respondent Gregg, the Doctor testified as follows:

> "A Well, I have given this considerable thought. I do feel that he is weak. He has a very weak ego, and at the time I examined him he showed very little conscience, almost none, and I feel that while he would be a good prisoner, as he was a good patient while I examined him, he was very cooperative, I do not feel that without 24 hours' supervision which one has in jail, I don't think he could make it. I am doubtful that he could go straight." (RT 664–665.)

It was the Doctor's opinion that it was very doubtful if respondent Polk could be rehabilitated "because of the proof of his total lack of moral and ethical considerations, and of the lack of emotional inhibitions . . ." (RT 674).

Respondents did not indicate any remorse as to the victims during the examination by Dr. Collet. The Doctor testified that in her opinion respondent Gregg did not institute the Fambro killing and that she believed Gregg's statement to her that Matthews mutilated the sailor Fambro, and that Gregg wanted to

give himself up after the killing of Fambro but was afraid to do so because of the gang (RT 696, 699).

EVIDENCE OF OTHER OFFENSES

(a) The San Francisco Trip and Related Crimes

Jack Blonde testified for the prosecution (RT 514).* Blonde met respondents at the Dairy Lunch restaurant in Los Angeles around May 15, 1962 (RT 515). This establishment is frequented by dope addicts and homosexuals. On the following evening Blonde met Avery Matthews at the Dairy Lunch restaurant (RT 517). On the evening of May 16 this group was driving around the downtown area of Los Angeles in a 1953 Mercury which had been loaned to them by a homosexual queen [i.e., the "female" partner in a male homosexual relationship] (RT 520). During the evening an attempt was made to obtain a gun (RT 522).

The group observed a drunk in the downtown area and decided to rob him (RT 521). Blonde threw the victim to the ground and respondent Polk jumped on his chest (RT 522). They then obtained the victim's wallet, watch and ring.

The group continued to look for persons to rob (RT 523). A plan was devised to walk the streets with Polk and Gregg on one side and Blonde and Matthews on the other. One person in each group was to act like a queen by swishing his hips "like a woman would do" in order to attract attention (RT 523, 524).

* The conspiracy count in the former proceedings was dismissed as to Blonde. In separate proceedings he entered a plea of guilty to the robbery of Neil Schill.

Shortly after this plan was put into operation, Matthews and Blonde were picked up by Mr. Delaney who was driving a 1962 Pontiac station wagon (RT 525). As they drove away, Blonde motioned to the respondents to follow (RT 525).

During the ride in the Pontiac, Delaney, the owner stated he wanted some pills (RT 525). Matthews instructed Delaney to stop at various houses for the purpose of obtaining some pills. Matthews did not have any pills at these places. Finally, Delaney drove down a dark street. Matthews threw pepper in his eyes and at the same time Blonde stabbed Delaney three or four times with a knife (RT 526). Delaney jumped from the car and was kicked several times while on the ground (RT 526). He was then robbed.

Blonde and Matthews returned to the Dairy Lunch in the Pontiac and informed the respondents of the Delaney incident. The group decided to go to Seattle with a stop in San Francisco. To obtain money for this trip, Blonde forged Delaney's name to a check and cashed it, the checkbook of Delaney having been obtained in the robbery (RT 528). A person named Johnny Keyes joined the group.

During the trip northward, the group stopped somewhere in the San Fernando Valley and went horseback riding with the exception of respondent Gregg who remained in the station wagon. During this period there was a discussion as to Johnny Keyes with respondents Polk and Matthews stating "that

Johnny was getting scared and they thought maybe they would have to do him in" (RT 530). To these remarks Blonde replied, ". . . I wasn't going for no killings and they wasn't going to do Johnny in. If they do Johnny in, they would have to do me in, too" (RT 531).

The next victim on the San Francisco trip was witness Schill, a paratrooper at the time. He was hitchhiking north on Highway 99 on the night of May 17, 1962 (RT 554). He had obtained a ride to the north edge of Bakersfield and was let out of that car about 1:00 a.m. Shortly thereafter, he was picked up by the group in the Pontiac station wagon (RT 555).

Matthews was driving the station wagon. He was dressed as a woman and the other occupants referred to him as "her" (RT 536). The station wagon proceeded north at speeds ranging from 60 to 80 miles per hour. The group stopped at a service station and entered a restaurant nearby. Schill remained in the station wagon (RT 557).

They returned in approximately 30 minutes and proceeded north on Highway 99. Matthews was driving and respondent Polk was in the front seat. Witness Schill was in the backseat with respondent Gregg seated to his right and Blonde to his left (RT 557). At this time Matthews stated to Schill, "Neil, do you know what you can do for me?" Schill replied, "No what?" Matthews stated, "Well, you can start by

taking all your clothes off." Schill remarked, "Are you serious?" At this point Blonde pulled a knife and held it in the front of Schill's face, stating, "Yes, he's serious, or else I'm cutting you up" (RT 558).

Schill grabbed the knife (RT 558). A general fight started with everyone kicking and swinging at Schill. Schill took the knife away from Blonde and in doing so received cuts on his hands (RT 559). Respondent Polk rubbed pepper in Schill's eyes, and respondent Gregg took his wallet (RT 558).

The car was stopped shortly after the fight started (RT 559). The right rear door was open and the other doors were blocked (RT 559). Matthews stood at the open door holding a beer bottle (RT 560). He told the others to "get the lead pipe" and stated to Schill "take your clothes off or else I'm going to smash you" (RT 560).

Schill left the vehicle by the right rear door. As he did so Matthews hit him in the mouth with the beer bottle. The bottle went through his lip and part of it broke off in his mouth. The blow broke a tooth and 11 or 12 stitches were required to close the lip wound (RT 560, 562). Schill was knocked to the ground. As he got up Matthews knocked his feet from under him (RT 561). Schill again got up and ran to the highway. He attempted to stop a northbound truck. He then ran across the highway divider and in front of a southbound passenger vehicle. It stopped and Schill got in.

Witness Blonde also testified as to the robbery and assault upon paratrooper Schill. His testimony was substantially similar to that given by Schill (RT 534).

Blonde testified to the robberies committed by the group after their arrival in San Francisco (RT 536). The first robbery was committed by forcing the victim into the station wagon. He was ordered to take off his clothes (RT 538). Respondent Polk assisted Matthews in taking off the victim's clothes (RT 539). During the robbery, respondent Gregg and Blonde hit the victim a couple of times on the head with a pop bottle (RT 539), and he was allowed to leave the Pontiac wearing only his socks.

The second robbery in San Francisco was accomplished on a dark street. Pop bottles were held near the victim's head and he was forced to give up his money (RT 539, 540).

Keyes left the group in San Francisco prior to the robberies (RT 537). Blonde had informed him that other members of the group wanted to kill him.

On the return trip to Los Angeles the group picked up a hitchhiking sailor and robbed him (RT 541).

RESPONDENT POLK'S ADMISSION AS TO THE KILLING OF RICHARD WADE

Officer Greeley, a lieutenant in the Los Angeles Police Department, conducted an investigation on or about April 11, 1962, of the death of Richard Wade. This person was also known as "The Hook" because of an amputed left arm (RT 727). The body of Wade was found some six or seven blocks from

Cooper's Donut Shop in Los Angeles. There were several pools of blood at the scene (RT 729). The victim had been severely beaten in the head and chest area (RT 730). Several ribs were fractured (RT 731). No valuables were found on his person.

Respondent admitted kicking the victim in statements given in July 1962 to Sergeant Brooks of the Los Angeles Police Department (RT 906, 909, 911). Dr. Collet testified that respondent Polk admitted to her that he stomped Wade to death (RT 668), and that he did it for kicks. Respondent in his testimony admitted knocking Wade down and kicking him (RT 1131, 1132) because Wade was cussing and agitating him.

RESPONDENT POLK'S ADMISSIONS AS TO THE KILLING OF RAYMOND SWEET

Witness Boren, a Deputy Sheriff of Tulare County, testified that he investigated a robbery on March 17, 1962, of a service station situated near Earlimart in Tulare County; that upon his arrival he discovered the attendant Raymond Sweet lying on the ground and gasping for breath (RT 712). That the attendant had been shot in the back with a .22 caliber firearm (RT 725), and that the attendant died shortly after the arrival of the officers (RT 721). An investigation disclosed that the cash box had been removed from the service station (RT 722).

Respondent Polk made certain admissions as to the killing of the service station attendant Sweet.

Sergeant Brooks of the Los Angeles Police Department took a statement from respondent Polk on June

8, 1962, in the Los Angeles County Jail (RT 902). Respondent Polk stated that respondent Gregg, Matthews, Spurlock, and he, entered the service station for the purpose of robbing it; that Spurlock asked the attendant to hand over the money; that he refused; that he did not know Spurlock had a gun; that he heard two shots but that he was not looking when the shooting occurred; and that the attendant was lying near the gas pumps when the group drove away (RT 905).

Dr. Collet testified that respondent Polk admitted to her that he shot the service station attendant (RT 667). He also admitted to Tulare County officers the attendant was killed with a .22 caliber automatic, although he did not name the person who did the shooting, this latter admission being made on January 18, 1963, the date respondents were transported to San Quentin following their first trial (RT 897, 898).

THE TESTIMONY OF RESPONDENTS

The respondents testified as to the events surrounding the mutilation and murder of the sailor Fambro. Their testimony as to these events is substantially identical.

Respondents went to a movie in Los Angeles on the evening of March 31, 1962 (RT 966). Later in the evening they met Matthews and his homosexual mate, Herford Sterling, at Cooper's Donut Shop (RT 970, 972). A trip to San Francisco was discussed. Respondent Polk stole a car for the trip (RT 975).

They departed for San Francisco at about daybreak on April 1, 1962. Matthews was driving and Sterling was in the frontseat. Respondents were in the backseat (RT 977).

Fambro was picked up near Bakersfield and was seated between respondents in the backseat (RT 978). Matthews made homosexual suggestions and advances to Fambro. He attempted to touch the sailor's penis by reaching his right hand over the back of the seat as Sterling assisted in steering the automobile (RT 981). Fambro knocked his hand away indicating he was not interested (RT 982).

An argument started between Fambro and respondent Gregg as to the length of time it takes to attain the rank of sergeant in the army (RT 983). Respondent Polk entered the argument when Fambro made derogatory remarks about the Negro race. A fist fight started between them (RT 986). After a few blows were struck, respondent Polk testified that he drew his gun and shot the sailor three times (RT 987). Respondent Gregg admitted grabbing Fambro's wallet during the fist fight (RT 1173).

Shortly after the sailor was shot, Matthews turned off Highway 99 onto Highway 65 and stopped the car. Respondent Polk was feeling ill and got out of the car (RT 988). As he left the car Fambro was in the backseat with Gregg, and Matthews was turning around toward the backseat (RT 988). When respondent Polk returned to the car he saw that Matthews had a knife in one hand and the sailor's penis in the

other (RT 989). Matthews did not say anything but laughed. He held the penis up and sucked on it (RT 989).

Respondent Gregg testified as to the amputation as follows:

"Q But you were afraid of Matthews when you saw that knife in his hand?

A Well, I was in a state of shock. I couldn't move, I just keep looking at him.

Q All right. What did Matthews do?

A Matthews popped open his fly and—pulled his fly open and sucked on it and then cut the sailor's penis off.

Q And you just sat there? A Yes.

Q Why didn't you do something?

A Well, if I do something, I would have got hit with the knife or something like that. See, I was scared to do anything.

Q Was there much blood involved with this amputation?

A Well, blood was running down the arm, the right arm of Matthews with the knife in the right hand and the sailor's penis in the left.

Q. Did he have blood on both hands?

A Both hands." (RT 1179–1180.)

The group then continued up Highway 65 to where the body of Fambro was thrown out of the car. They then returned to Los Angeles.

Both respondents testified that Matthews had threatened them not to involve him in the Fambro killing and that such threats accounted for their testimony

at the former trial to the effect that Matthews was not present during the mutilation and killing of Fambro. At the former trial each respondent testified that the other committed the mutilation.

C. Reasons for Granting Writ

1. The decision below presents federal questions not previously determined by this Court which are of great importance in the field of criminal law.

(a) Summary of Decision Below

The California Supreme Court has held that the case of *Escobedo* v. *Illinois* and its case of *People* v. *Dorado,* 62 Cal.2d 338, 398 P.2d 361, 42 Cal. Rptr. 169, should not be given retroactive effect but that these cases should have prospective operation only (*In re Lopez,* 62 Cal.2d 368, 398 P.2d 380, 42 Cal.Rptr. 188). However, in defining "prospective" the court holds that *Escobedo* applies not only to cases pending on direct review at the time *Escobedo* was decided on June 22, 1964, but also to cases in which the time to petition for certiorari had not elapsed although no petitions were filed in such cases. This holding applied to the present case results as follows. The judgment on the issue of guilt was affirmed on March 31, 1964 (*People* v. *Polk,* 61 Cal.2d 217, 390 P.2d 641, 37 Cal.Rptr. 753). Within the 90 days thereafter in which respondents could have applied for certiorari (28 U.S.C.§ 2101(d); Rule 22, Rules of the United States Supreme Court), this Court on June 22, 1964,

decided *Escobedo*. Thus, according to the California Supreme Court the judgment in this case on the issue of guilt entered March 31, 1964, was not final when *Escobedo* was decided and consequently that case and its numerous California progeny (i.e., *People* v. *Dorado,* 62 Cal.2d 338, *People* v. *Stewart,* 62 Cal.2d 571, 400 P.2d 97, 43 Cal.Rptr. 201 cert. granted, *California* v. *Stewart,* Dec. 6, 1965, 34 LW 3201), apply to the guilt issue here. Thus applied, the court reverses the judgments against respondents in their entirety.

The California Supreme Court bases its decision upon the assertion that such result is compelled by this Court's statement as to finality of judgments contained in footnote 5 of *Linkletter* v. *Walker,* 381 U.S. 618, 14 L.Ed.2d 601, 85 S.Ct. 1731. This footnote provides as follows:

> "By final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before our decision in *Mapp* v. *Ohio.*"

The statement of the California Supreme Court applying this footnote in the present case is as follows:

> "The Attorney General contends that the judgment on the issue of guilt was final before the decision in *Escobedo* v. *Illinois,* 378 U.S. 478, thereby precluding reversal on the grounds of that decision. (*In re Lopez,* 62 Cal.2d 368, 376.) There is no merit in this contention. The judgment

on the issue of guilt was affirmed on March 31, 1964. (*People* v. *Polk,* 61 Cal.2d 217.) Within the 90 days thereafter in which defendants could have applied for certiorari (see 28 U.S.C. § 2101(d); rule 22, Rules of the United States Supreme Court), on June 22, 1964, the United States Supreme Court decided the *Escobedo* case. Thus the judgment on the issue of guilt was not final at the time of *Escobedo,* since the United States Supreme Court has stated that 'by final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed. . . .' (*Linkletter* v. *Walker,* ___ U.S. ___ [85 S.Ct. 1731, 1734, fn. 5].) . . . ." (63 A.C. 461, 465–466.)

The California Supreme Court in its decision before granting a rehearing had held that the guilt issue was final, the court stating as follows:

"It is contended that since the confessions admitted into evidence at the trial on the issue of guilt were obtained in violation of *Dorado* and *Escobedo,* the judgments of guilt must also be reversed. We do not agree with this contention. Judgments that became final before *Escobedo,* as in this case, will not be reopened on the ground that confessions were admitted in violation of *Dorado* and *Escobedo.* (*In re Lopez,* 62 A.C. 380, 388.) Our affirmance of the judgments of guilt on the first appeal (*People* v. *Polk,* 61 Cal.2d 217, 234–235) made the judgments on that issue final judgments subject to immediate review by the United States Supreme Court. (*Brady* v. *Maryland,* 373 U.S. 83, 85.) If it appeared that despite

the right to seek immediate review, the United States Supreme Court would treat the issue of guilt as still open on a subsequent petition for certiorari, it would be pointless for us to refuse to reconsider it now. The United States Supreme Court has not held, however, that the finality of a judgment on the issue of guilt is not an adequate state ground for refusing to reopen that judgment to consider a federal claim based on *Escobedo*. We therefore conclude that an attack on the adjudication of guilt on this appeal is collateral and subject to the same limitation applicable to collateral attack by habeas corpus set forth in *In re Lopez*, 62 A.C. 380." (402 P. 2d 845, at p. 852.)

(b) The Prospective Operation of ESCOBEDO v. ILLINOIS, 378 U.S. 478, 12 L.Ed.2d 977, 84 S.Ct. 1758, Does Not Extend to a Final State Court Conviction in which the Time to Petition This Court for Certiorari had not Expired on the Date Escobedo was Decided Where No Petition to Review Said State Court Conviction was Presented to This Court

It is petitioner's position that the *Linkletter* decision was not intended to establish a new rule of finality of judgments for purposes of determining prospective application of a federal decision. The case does not hold that the prospective operation of *Mapp* or any other case extends to final state court judgments in which no petition for certiorari to this Court was filed although the time for filing had not expired at the date of the *Mapp* or other federal decision.

Under 28 U.S.C. 1257, only "final judgments or decrees" rendered by the highest court of a state in which a decision could be had are reviewable by the Supreme Court. The test of finality of judgments for purposes of review by the Supreme Court is formu-

lated by that court while the test of finality for other purposes is a matter of local law (*Dept. of Banking* v. *Pink,* 317 U.S. 264; *Richfield Oil Corp.* v. *State Board of Equalization,* 329 U.S. 69; *Market Street Railway Co.* v. *Railroad Commission,* 324 U.S. 548). In *Konigsberg* v. *California State Bar,* 366 U.S. 36, 6 L.Ed.2d 105, 81 S.Ct. 997, this Court stated that absent some purpose to evade the court's prior decision in the case the principles of finality are, within broad limits of fundamental fairness, solely the concern of California law. (See: *Townsend* v. *Sain,* 372 U.S. 293, 313, fn. 9 (1963), reflecting that matters of procedure within the state courts are largely governed by state law; and *Fay* v. *Noia,* 372 U.S. 391, 435–436 (1963), reflecting that a petition for certiorari does not necessarily enhance the finality of a state court judgment.)

Persuasive that a determination of finality is a matter of local law is the observation made by the court in *Mapp* v. *Ohio,* footnote 9 that, "As is always the case, however, state procedural requirements govering assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected." Also in *Fay* v. *Noia,* 372 U.S. 391, the case of *Darr* v. *Burford,* 339 U.S. 200, 94 L.Ed. 761, 70 S.Ct. 587, was overruled only to the extent that it barred a state prisoner from federal habeas corpus relief if he failed to seek certiorari from an adverse state decision. Previously certiorari had been considered as part of the requirement of

exhaustion of state remedies. Thus, by analogy, since certiorari no longer forms an indispensable part of the state court remedy, the time for filing the petition for certiorari should not be a factor in determining finality questions of state judgments.

This Court in *Linkletter* defined "retrospective" in the following terms:

> "Initially we must define the term 'retrospective' for the purposes of our opinion. A ruling which is purely prospective does not apply even to the parties before the court.* See, e.g., England v Louisiana State Board of Medical Examiners, 375 US 411, 11 L ed 2d 440, 84 S Ct 461 (1964). See also Great Northern R. Co. v Sunburst Oil & Refining Co., 287 US 358, 77 L ed 360, 53 S Ct 145, 85 ALR 254 (1932). However, we are not here concerned with pure prospectivity since we applied the rule announced in Mapp to reverse Miss Mapp's conviction. That decision has also been applied to cases still pending on direct review at the time it was rendered.* Therefore, in this case, we are concerned only with whether the exclusionary principle enunciated in Mapp applies to state court convictions which had become final * before rendition of our opinion." (*Linkletter* v. *Walker*, 381 U.S. 618, 14 L.Ed.2d 601, 85 S.Ct. 1731.) (Footnotes omitted.)

It is submitted that under the above definition the "retrospective" effect of a new decision only reaches back to cases "still pending on direct review." Such operation of a new decision does not extend to cases

which could have been pending but were not because review was not sought. It should also be noted that the interpretation of "prospective" by the California court in this case was not necessary under the factual situation presented in *Linkletter*. In *Linkletter*, the petitioner was convicted on May 28, 1959, and his conviction was affirmed on appeal in March 1960—more than a year before *Mapp* was decided on June 19, 1961. Thus, it is clear that this Court in *Linkletter* was not required to pass upon the retroactive question as presented by the factual situation in the present case. It should also be noted that this Court in citing several examples of prospective operation of new decisions in the *Linkletter* case does not cite a single case where prospective effect was given to a case which might have been but was not pending at the time of the new decision. (See *Commonwealth* v. *Negri*, 213 A. 2d 670 (Pa., 1965).)

It is thus submitted that in the light of the above cases, the *Linkletter* footnote, was not intended to announce a new rule as to finality of judgments applicable to the states. The footnote applied to the present case only means that respondents had 90 days from March 31, 1964,* in which to file a petition for certiorari and no petition having been filed during that time, the judgment became final in accordance with

* The California Supreme Court entered its decision March 31, 1964. Rule 22(1) of the Supreme Court Rules provides for filing the petition for certiorari within 90 days after entry of judgment. It appears the judgment for purposes of review was final on April 29, 1964, the date rehearing was denied.

state law; i.e., May 1, 1964, the date of the issuance of the remittitur pursuant to Rule 24 of the Rules on Appeal.

(c) The Judgment on the Issue of Guilt Became Final and was Subject to Immediate Review by This Court

This Court considers as final for its review purposes a state court judgment which conclusively disposes of a separate and distinct issue although other matters in the overall litigation are not final.

Thus in *Brady* v. *Maryland,* 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194, the Court concluded that a decision on a petitioner's appeal in a postconviction proceeding, remanding the case for retrial on the question of punishment but not on question of guilt was a final judgment within the meaning of the section relating to Supreme Court review of final judgments by certiorari (*Clark* v. *Williard,* 292 U.S. 112; *Bowker* v. *United States,* 186 U.S. 135; *Gospel Army* v. *City of Los Angeles,* 331 U.S. 543, 91 L.Ed. 1662, 67 S.Ct. 1428; *Baltimore Contractors Inc.* v. *Bodinger,* 348 U.S. 176, 75 S.Ct. 249, 99 L.Ed. 233).

It is thus clear that the judgment of guilt in this case became final and was subject to immediate review by the Supreme Court. Under California procedure the adjudication of guilt was a separate and distinct issue determined in a separate proceeding and upon affirmance of that adjudication nothing remained to be done on the subject. Finality as to the guilt issue was thus established for purposes of review.

(d) The Administration of Justice Would Not be Promoted by a New Definition of Finality for Purposes of Applying the Escobedo and Dorado Decisions

This case shows that the administration of criminal justice would not be promoted by the adoption of a rule providing judgments are not final until the period in which to apply for certiorari has run for the purpose of determining the application of the *Escobedo* and *Dorado* decisions.

It was noted in the case of *In re Lopez,* 62 Cal. 2d 368, 398 P.2d 380, 42 Cal.Rptr. 188, that the Court in *Escobedo* sought the correction of conditions which invited coerced confessions and the attendant evils. The California Supreme Court listed the following considerations in *Lopez* in determining that *Escobedo* and *Dorado* do not apply retroactively to judgments which had become final prior to the date of the *Escobedo* decision:

> "We reach this conclusion upon the basis of the three following propositions which we shall more fully analyze hereinafter: First, although the United States Supreme Court in *Escobedo,* by providing a suspect with an opportunity to obtain the protection of counsel at the accusatory stage, sought to eliminate conditions which invited coerced confessions, the ruling does not require a retroactive application. Second, new interpretations of constitutional rights have been, and should be, applied retroactively only in those situations in which such new rules protect the innocent defendant against the possibility of conviction of a crime he did not commit; *the fact that defendant*

> ***was denied counsel under Escobedo does not affect the issue of guilt.*** Third, an absolute rule of retroactivity as to interpretations of constitutional rights which envisage the correction of future practices would impair the administration of criminal law and ultimately result in constitutional rigidity." (*In re Lopez,* 62 Cal. 2d 368 at p. 372.) (Emphasis added.)

The test of finality adopted in this case which the court asserts was compelled by *Linkletter* would require a new trial on the issue of guilt in this case, since the time to petition for certiorari had not expired on June 22, 1964, the date of the *Escobedo* decision. Thus, if that test of finality is applied here, which requires the application of *Escobedo* and *Dorado,* a brutal and vicious murder may go unpunished.* Such a result would be accomplished by the application of a rule, the *Dorado* rule, which, as the California court has stated, is unconnected with the issue of guilt. Here there is no question as to the voluntariness of the confessions of Polk and Gregg of the vicious murder of the sailor Fambro and it is undisputed that these confessions establish guilt in an overwhelming fashion. The novel rule of finality adopted by the California court would not promote the orderly administration of justice. Contrary to the

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* As to the state of the evidence without the confessions, the California Supreme Court stated at page 12 of its opinion: "Had the confessions been excluded, there would have been so little evidence against them as to obviate any need to take the stand."

statements of the California court, this Court's decision in *Linkletter* does not compel the adoption of this rule.

(e) Respondents, While Represented by Counsel, Accepted the Judgment on the Issue of Guilt

The record as summarized above shows that counsel for respondents participated in matters relative to setting the case for retrial on the penalty issue and that counsel for respondents made no objection to the retrial. If either respondent had intended to petition for certiorari they would have objected to participating in proceedings concerning the resetting of the penalty trial. In addition, the record shows the absence of any application for a stay of execution to enable either respondent to petition for certiorari. Likewise, after the decision in *Escobedo* was rendered, counsel for respondents did not apply for a stay in order to petition for certiorari in the light of that decision. It is therefore submitted that respondents waived the right to petition for certiorari and in view of such waiver the time for filing the petition should not be the factor in determining finality in the present case.

(f) Scope of Escobedo

Petitioner, as to questions numbered 2, 3 and 4 presented herein pertaining to the scope of the *Escobedo* decision, relies upon its petition in *California* v. *Stewart,* certiorari granted December 6, 1965, No. 584, 34 LW 3201.

CONCLUSION

For the foregoing reasons petition for writ of certiorari should be granted.

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APPENDIX A

IN THE
SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

THE PEOPLE,
Plaintiff and Respondent,
v.
RONALD HOWARD POLK and GEORGE ANTHONY GREGG,
Defendants and Appellants.

FILED
OCT 20 1965
WILLIAM I. SULLIVAN
Clerk
By _____
S. F. DEPUTY
Crim. 8312

Defendants were convicted of conspiracy to commit kidnaping for the purpose of robbery (Pen. Code, §§ 182, 209) and of the first degree murder of William Fambro. (Pen. Code, § 189.) The jury fixed the penalty at death on the murder count, and defendants were sentenced to prison for the term prescribed by law on the kidnaping count and to death on the murder count. On appeal, the judgments were reversed for a new penalty trial only. (People v. Polk, 61 Cal.2d 217. 234.) Upon retrial, the jury again fixed the penalty for each defendant at death. This appeal is automatic. (Pen. Code, § 1239, subd. (b).)

The essential facts are set forth in our former opinion and need not be repeated. (People v. Polk, 61 Cal. 2d 217.)

At the second trial on the issue of penalty, there was also evidence that Polk admitted complicity in the killing of a gas station attendant, Raymond Sweet, on

March 17, 1962, and, with Jesse Ferguson, in kicking to death in Los Angeles on April 10, 1962, a skid row inhabitant called "The Hook."

Defendants were arrested in Los Angeles on May 20, 1962. The police began to question them on the day they were arrested and continued to do so for several months thereafter. They obtained numerous confessions concerning the murder of Fambro and other incidents of the alleged conspiracy. One officer estimated that he talked to defendant Gregg twenty times and to defendant Polk ten times. At the trial on the issue of guilt, transcripts of some of these statements, tape recordings of some, and police testimony describing others were admitted into evidence against both defendants. At the second penalty trial, a tape recording of one of Gregg's confessions, police testimony describing some of his other confessions, and police testimony describing Polk's confession of other crimes were admitted into evidence. Their testimony at the trial on the issue of guilt was also read into evidence.

Confessions are inadmissible if they were obtained when "(1) the investigation was no longer a general inquiry into an unsolved crime but had begun to focus on a particular suspect, (2) the suspect was in custody, (3) the authorities had carried out a process of interrogations that lent itself to eliciting incriminating statements, (4) the authorities had not effectively informed defendant of his right to counsel or of his absolute right to remain silent, and no evidence establishes that he waived these rights." (People v. Dorado, 62 Cal.2d 338, 353; Escobedo v. Illinois, 378 U.S. 478.) The confessions were admitted into evidence at the trial on the issue of guilt and at the second penalty trial in violation of this rule.

All the confessions admitted into evidence were made after defendants had been arrested. All were obtained during several months of persistent police interrogation designed to elicit incriminating statements about many crimes. "[W]hen the officers have arrested the suspect and the officers have undertaken a process of interrogations that lends itself to eliciting incriminating statements, the accusatory or critical stage has been reached and the suspect is entitled to counsel." (People v. Stewart, 62 Cal.2d 571, 577.) The first confession regarding the Fambro murder, the tape recording of defendant Gregg on June 2, begins: "George, in your own words . . . tell us as you told us before exactly what happened pertaining to this sailor boy." Similarly, Sergeant Brooks testified that defendant Polk's first statement about the killing of "The Hook" was obtained as follows: "I told him we were pretty sure that Jesse Ferguson had been involved and I was fairly certain that he was with Jesse when 'The Hook' was killed, and I asked if he was, and he said, 'Yes.' "

There is no evidence that defendants were at any time advised of their right to counsel or of their absolute right to remain silent, and we cannot presume that they were so advised. (People v. Stewart, supra, 62 Cal.2d 571, 581.) Accordingly, all the confessions should have been excluded. (People v. Dorado, 62 Cal. 2d 338, 353.)

The Attorney General contends that the judgment on the issue of guilt was final before the decision in Escobedo v. Illinois, 378 U.S. 478, thereby precluding reversal on the grounds of that decision. (In re Lopez, 62 Cal.2d 368, 376.) There is no merit in this conten-

tion. The judgment on the issue of guilt was affirmed on March 31, 1964. (People v. Polk, 61 Cal.2d 217.) Within the 90 days thereafter in which defendants could have applied for certiorari (see 28 U.S.C. § 2101 (d); rule 22, Rules of the United States Supreme Court), on June 22, 1964, the United States Supreme Court decided the *Escobedo* case. Thus the judgment on the issue of guilt was not final at the time of *Escobedo,* since the United States Supreme Court has stated that "by final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed . . . ." (Linkletter v. Walker, ___ U.S.___ [85 S.Ct. 1731, 1734, fn. 5].) . . . In the *Linkletter* case, when faced with the retroactivity of Mapp v. Ohio, 367 U.S. 643, the United States Supreme Court made clear that judgments not final at the time of the *Mapp* decision were reviewable by a writ of habeas corpus. Accordingly, federal habeas corpus will also be available to review judgments not final at the time of the *Escobedo* decision that are attacked on the basis of the rule in that case. (See Fay v. Noia, 372 U.S. 391, 438.) As we pointed out in In re Spencer, 63 A.C. ___, ___, "Whether or not we are compelled to afford defendants a comparable state collateral remedy (see Case v. Nebraska (1965) ___ U.S. ___ [85 S.Ct. 1486]; Henry v. Mississippi, supra, ___ U.S. ___ [85 S.Ct. 564]; In re Shipp (1965) 62 A.C. 573, 579, fn. 2; 76 Harv.L.Rev. (1963) 1253, 1269), the availability of the federal remedy makes it pointless for us to refuse to do so, when, as in this case, defendant is entitled to a new trial on the issue of penalty. Moreover, the grant of state collateral relief in these circumstances accords with our traditional habeas

corpus rules. This court normally affords collateral relief on constitutional grounds if the petitioner had no opportunity to raise the constitutional issue at trial and on appeal. (See In re Dixon (1953) 41 Cal.2d 756, 760–761; In re Shipp, supra, 62 A.C. 573, 577–579.) Petitioner had no such opportunity when, as in this case, the new constitutional right had not been declared at those times. (See People v. Hillery (1965) 62 A.C. 726, 745; People v. Kitchens (1956) 46 Cal.2d 260, 262–263.)" The attack on the judgments on the issue of guilt on this appeal from the judgments on the issue of penalty is comparable to a collateral attack, thereby requiring us to follow our practice on collateral attack by granting relief.

There is no merit in the Attorney General's contention that even if the confessions were admitted in violation of *Escobedo,* their admission was not prejudicial since defendants took the stand and testified to committing the same acts described in their confessions. When defendants testified, the only substantial evidence connecting them with the Fambro murder, for which the jury fixed the penalty at death, was their inadmissible extrajudicial confessions and admissions. The defendants had no evidence but their own testimony to present on their own behalf. Thus their failure to take the stand would have made verdicts of guilty certain after the prosecution's introduction of the numerous confessions. Defendants therefore took the stand and again confessed, presumably hoping that the jury would find them guilty of a lesser offense than first degree murder. Thus, their testimony was impelled by the erroneous admission of the confessions and cannot be segregated therefrom to sustain the judgment. (Fahy v. Connecticut, 375

U.S. 85, 91–92; People v. Davis, 62 Cal.2d 791, 796; People v. Dixon, 46 Cal.2d 456, 458; People v. Ibarra, 60 Cal.2d 460, 463; see also People v. Mickelson, 59 Cal.2d 448, 449.) Moreover, some of the extrajudicial confessions were more prejudicial to the defendants than their trial testimony. Thus, in the tape recording of defendant Gregg's first statement, he confessed to a more active role in the Fambro killing than he admitted at the trial. The prejudicial effect of the admission of this tape recording is emphasized by the fact that at the second penalty trial the jury returned to the courtroom and requested that the instructions be given again, that Gregg's tape-recorded statement be replayed, and that parts of his testimony be reread.

Since the violations of *Escobedo* affected the whole trial, the judgments on both the conspiracy and murder counts must be reversed.

Other questions remain that may arise on retrial.

At the trial on the issue of penalty, the testimony of the psychiatrist describing defendants' admissions to her and defendants' testimony at the trial on the issue of guilt that was read into evidence should also have been excluded. The psychiatrist interviewed each defendant twice at the request of the district attorney's office. She was thus an agent of the prosecution with no more right than any such agent to elicit admissions from defendants without their being informed of their rights. (See People v. Quinn, 61 Cal. 2d 551.) The admissions of guilt of numerous crimes made to the psychiatrist should therefore have been excluded. (People v. Dorado, 62 Cal.2d 338, 353.)

Defendants' testimony at the trial on the issue of guilt was read into evidence in the second penalty

trial. That testimony was impelled by the erroneous admission of the confessions. (People v. Davis, supra, 62 Cal.2d 791, 796.) Consequently, the testimony was inadmissible at any future trial and should have been excluded. Similarly, defendants' testimony at the second penalty trial will be inadmissible hereafter. That testimony also was impelled, at least in part, by the admission of evidence obtained in violation of *Escobedo.*

Defendants contend that the introduction of a photograph depicting Fambro's body lying in the grass at the bottom of an embankment and of the victim's bloody undershorts was prejudicial. The introduction of this evidence would be prejudicial if the danger of prejudice to the defendant outweighed its probative value. (People v. Henderson, 60 Cal.2d 482, 495.) The most inflammatory photographs were properly excluded, and the trial court did not abuse its discretion in holding that the remaining photographs and the undershorts were not unduly prejudicial. (People v. Arguello, 61 Cal.2d 210, 213; People v. Lindsey, 56 Cal.2d 324, 328.)

At the second penalty trial, the district attorney argued to the jury that unless the death sentence was imposed, the defendants would get a "free ride" for the killing of Fambro and for other crimes. The trial court correctly ruled that such an argument is improper. "The district attorney . . . improperly discredited the Adult Authority by arguing that a life sentence for the murder would not increase defendant's punishment since he already was subject to a life term as the result of [other crimes], when it is clear that the sentencing authority would consider a first degree murder as a factor toward increasing the

length of the total prison term." (People v. Treloar, 61 Cal.2d 544, 549.)

Defendants contend that since evidence of other crimes was introduced at the trial on the issue of penalty, an instruction that such crimes must be proved beyond a reasonable doubt should have been given. We agree with this contention. Generally, the standard of competency of the evidence at the trial on the issue of penalty is the same as the standard required at the trial on the issue of guilt. (People v. Hamilton, 60 Cal.2d 105, 129.) Since evidence of other crimes, however, may have a particularly damaging impact on the jury's determination whether the defendant should be executed, we recognized in People v. Terry, 61 Cal.2d 137, 149, fn. 8, that there should be an exception to the normal standard of proof at the trial on the issue of penalty (People v. Purvis, 56 Cal.2d 93, 95). Thus, even though at the trial on the issue of guilt the jury must only be convinced that it is more probable than not that the defendant committed other crimes before it may consider them (People v. Albertson, 23 Cal.2d 550, 579, 581), at the trial on the issue of penalty they must be convinced beyond a reasonable doubt.

Finally, defendants contend that the trial court must instruct on the legal considerations that the jury should take into account when deciding whether the penalty should be death or life imprisonment. We do not agree that such an instruction is compulsory. The Legislature has entrusted to the absolute discretion of the jury the awesome decision between life imprisonment and the death penalty in first degree murder cases. (Pen. Code, § 190; People v. Green, 47

Cal.2d 209, 218.) The Legislature has thus indicated its belief that jurors understand the factors that are relevant to such a decision. Recitation of such factors by the trial court is therefore not essential. The trial court, may, however, properly aid the jury by stating the kinds of factors that may be considered, thereby setting the tone for the jury's deliberation. (See People v. Friend, 47, Cal.2d 749, 767–768; Model Penal Code, § 210.6 (Proposed Official Draft 1962).) In this case, the trial court erroneously instructed that the jury cannot be influenced by "pity for the defendant" or "sympathy" for him. (CALJIC No. 1.) Although appropriate on the issue of guilt, this instruction improperly eliminates factors that a jury may consider in fixing the punishment. (See People v. Friend, supra, 47 Cal.2d 749, 767–768.)

Since other questions raised are not likely to arise on retrial, we need not decide them here.

The remittitur in People v. Ronald Howard Polk and George Anthony Gregg, Crim. No. 7356, 61 Cal. 2d 217, is recalled and the judgment of the Supreme Court of March 31, 1964, vacated as to defendants Polk and Gregg. The judgments appealed from are reversed in their entirety.

TRAYNOR, C. J.

We concur:
PETERS, J.
TOBRINER, J.
PEEK, J.

PEOPLE v. POLK and GREGG
Crim. 8312

Dissenting Opinion by Burke, J.
to
Opinion by Traynor, C. J.

I dissent. As noted in the opinion affirming the judgments of guilt at the first trial (*People* v. *Polk*, 61 Cal.2d 217, 220), "The evidence establishes the perpetration of a series of brutal crimes—kidnapings, assaults with a deadly weapon, armed robberies, and murder with mutilation of the victim—committed in concert by these defendants . . . ." I am of the opinion after "an examination of the entire cause, including the evidence" (as mandated by section 4½, article VI, of the California Constitution), that it is not reasonably probable that a result more favorable to defendants Polk and Gregg would have been reached in the absence of the errors noted in the opinion of the majority. I would affirm the judgments appealed from in their entirety.

BURKE, J.

We concur:
McCOMB, J.
* SCHAUER, J.

* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

APPENDIX B

IN THE

SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

THE PEOPLE,
Plaintiff and Respondent,
v.
RONALD HOWARD POLK and
GEORGE ANTHONY GREGG,
Defendants and Appellants.

FILED
JUN 18 1965
WILLIAM I. SULLIVAN
Clerk
By _____
S. F. DEPUTY
Crim. 8312

Defendants were convicted of first degree murder and sentenced to death. On appeal, the judgments were reversed for a new penalty trial only. (People v. Polk, 61 Cal.2d 219, 234.) Upon retrial, the jury again fixed the penalty for each defendant at death. This appeal is automatic. (Pen. Code, § 1239, subd. (b).)

Defendant Gregg told many conflicting stories in describing the circumstances of the murder, as did defendant Polk. Certain facts, however, are not disputed. On March 30 or 31, 1962, defendants met in a Los Angeles restaurant and agreed to drive north. Shortly after passing Bakersfield, defendants picked up William Fambro, a 20-year-old sailor who was hitchhiking to his ship. After driving further along Highway 99, Polk shot Fambro three times. As Fambro was dying, someone ripped open his trousers and "rather crudely amputated" his penis. Fambro's

wallet was stolen, and Polk and Gregg threw his body over an embankment.

At the trial on the issue of guilt, Polk and Gregg testified that they were alone at the time of Fambro's murder. They met at the Los Angeles restaurant and agreed that they needed money. Polk suggested that they "pull some jobs together." Gregg asked, "What kind of jobs?" and Polk replied, "Service stations and liquor stores." Gregg agreed. Polk then stole a car, obtained a gun from his apartment, and picked up Gregg. As they began driving, Polk suggested that they head north to pull the jobs since the police were "too hot" in Los Angeles. After looking over a few places in San Fernando, they headed north on Highway 99. They cased some places in Bakersfield, and continued north looking for something to "knock over." They saw William Fambro hitchhiking and stopped to pick him up. The defendants disagree about what happened then. Polk testified that Gregg and Fambro began arguing, and that he became involved in the argument only after Fambro called him dirty names. Polk stopped the car, began fighting with Fambro, and pulled out his gun and shot Fambro three times. Polk accused Gregg of amputating Fambro's penis and of stealing his wallet. Gregg testified that there was no argument and that Polk shot Fambro without warning after Fambro had complied with Polk's demand for his wallet. Gregg accused Polk of amputating Fambro's penis. After the amputation, the defendants threw Fambro's body over an embankment and headed back to Los Angeles.

Defendants testified at the second penalty trial and also told the police that four people were involved in the murder of William Fambro. Although the

details of their many stories varied widely, they testified at the trial that they met Avery Matthews and Herford Sterling on the evening of March 31, 1962, and decided to drive north to San Francisco. Polk stole a car, and the four headed north in the early hours of April 1. Matthews drove, Sterling sat beside him in the front seat, and Polk and Gregg sat in the rear. Near Bakersfield, they picked up William Fambro who was hitchhiking and he sat in the back seat between the defendants. As they proceeded north, Matthews asked Fambro if he ever had sexual relations with a homosexual, reaching his hand over to the back seat. Fambro replied, "no," and knocked the hand away. Fambro and Gregg began an argument about the military service. Polk became involved when Fambro used the word "nigger," and the two began to fight. During the fight, Gregg lifted Fambro's wallet. Polk then pulled out his gun and shot Fambro three times. They continued driving and pulled off on a side road. Polk got out, Gregg sat shocked in the back seat, with Fambro dying beside him. Matthews turned around on his knees, ripped open Fambro's fly with a knife, amputated Fambro's penis, and placed it in his mouth, laughing in a high-pitched, woman's voice. Polk returned to the car, and they drove further along the road. They stopped to dump the body down an embankment and then headed back to Los Angeles.[1]

[1] Matthews has denied complicity in the crime. He was a defendant originally, but the charges against him were dismissed on the thirteenth day of the guilt trial. The district attorney announced that Matthews had been in jail until 4:45 p.m. on March 31, 1962, and that therefore there was a reasonable doubt that Matthews was present when Fambro was killed. (People v. Polk, 61 Cal.2d 217, 225.) Herford Sterling apparently has never been found.

The evidence linking defendants with other brutal crimes was summarized in our former opinion as follows:

"Jack Blonde testified that on the evening of May 15 or 16 he met Polk, Gregg and Matthews in the Dairy Lunch. They drove around in a 1953 Mercury, saw a drunk and decided to rob him. Matthews parked the car, Blonde threw the victim to the ground, and Polk 'stomped' him by jumping on his chest with both feet. They took his wallet and watch and drove away. Thereafter they attempted to obtain a gun but were unsuccessful. The following night the four of them went walking, 'looking for another person to rob.' Polk and Gregg walked on one side of the street, Matthews and Blonde on the other. Blonde spotted a 1962 Pontiac station wagon following them, and Matthews told him to 'act like a queen' (i.e., the 'female' partner in a male homosexual relationship). The witness explained that this meant to walk 'swishing' one's buttocks from side to side. The driver of the station wagon, a Mr. Delaney, stopped and picked up Blonde and Matthews. As they entered the car Blonde motioned for Polk and Gregg to follow, but the latter were unable to do so. After driving around in a pretended search for benzedrine, Matthews threw pepper in Delaney's eyes, and Blonde stabbed him four times in the chest. Delaney escaped from the car, but Matthews and Blonde chased him, knocked him down, kicked him several times, and tore his clothes looking for money. They then took his station wagon, returned to the Dairy Lunch and picked up Polk and Gregg, and stole a set of paper license plates for the car. Taking Johnny Keyes with them, the five set out for San Francisco with Matthews driving. First they

saw an old man with a cane, and selected him as a victim. Blonde, Polk and Matthews, the latter carrying an iron bar, got out of the car. Polk and Matthews grabbed the old man, the cane and iron bar flew through the air, and the old man fell to the ground. The assailants ran back to the car with the victim's wallet and drove on.

"Neil Schill, a paratrooper . . . , testified that after midnight on the morning of May 17, 1962, he was hitchhiking on Highway 99 just north of Bakersfield when he was picked up by a new Pontiac station wagon.[2] On entering the car he first saw only three people, two in the front and one in the middle seat; the driver appeared to be a woman, was wearing a woman's sweater, and was referred to as 'her' by the others. After he got in, Schill heard someone stirring behind him and saw two men in the back seat. A few minutes later they pulled into a gas station to have the car's radiator serviced, and all but Schill went into an adjoining restaurant. Schill, who had not slept for two days, remained in the car and tried to sleep. In the restaurant it was decided to rob Schill, and Matthews emptied the pepper from a shaker on the table, rolled it in a napkin and put it in his pocket. On returning to the car Matthews and Polk entered the front seat, Gregg and Blonde entered the middle seat on either side of Schill, and Keyes got in the back.

"Schill testified that shortly thereafter 'we were driving along about eighty miles an hour and the

[2] Defendants and Matthews were convicted of conspiring to kidnap Neil Schill for the purpose of robbing him. The defendants were sentenced to the state prison for the term prescribed by law. (Pen. Code, §§ 182, 209.) That judgment was affirmed on appeal. (People v. Polk, 61 Cal.2d 217, 219, 235.) In another proceeding Blonde pleaded guilty to the robbery of Schill.

woman—Matthews—said, "Neil, do you know what you can do for me?" And I said, "No, what?" And he said, "Well, you can start by taking all your clothes off." And I said, "Are you serious?" And at this time Blonde pulled a knife and held it in front of my face and said, "Yes, she is serious, or else I'm going to cut you up." Schill grabbed the blade and twisted it away from Blonde; as he turned to do so, Gregg reached into Schill's back pocket and took his wallet. Then, as Schill described it, 'everyone started to swing at me and kick me, and I believe Polk had taken some pepper out of the glove compartment and rubbed it in my eyes.' Matthews finally brought the car to a stop, and everyone except Schill scrambled out and took positions around the outside of the car, trying to keep all the doors shut but one. Matthews stood at the open door with a beer bottle in his hand, saying, 'get the lead pipe.' As Schill got out Matthews said to him, 'Take your clothes off or else I'm going to smash you in the face.' Schill lunged forward and Matthews hit him in the face with the bottle, breaking off a tooth and badly cutting his mouth. When Schill tried to get up Matthews kicked his feet out from under him. But Schill, bleeding heavily, managed to run across the highway and escape by flagging down a passing car.

"Blonde testified that the five continued driving to San Francisco, having divided among them the contents of Schill's wallet and duffel bag. Keyes left the party in San Francisco, and the remaining four drove around the city 'looking for somebody to rob.' They saw a Mexican walking along the sidewalk and pulled him into the car. As they continued driving they robbed him of his watch and a ring, and forced him to remove his clothes, and turned him out into the

street naked except for his socks. They found no more victims to rob in San Francisco, although they were 'hoping for another one.' On their return trip to Los Angeles they picked up a hitchhiking sailor, turned off the highway onto a side road, and robbed him of his money and the contents of his duffel bag." (People v. Polk, 61 Cal.2d 217, 221–223.)

The police and a psychiatrist who examined defendants at the request of the district attorney testified that Polk admitted complicity in the killing of a gas station attendant, Raymond Sweet, on March 17, 1962, and, with Jesse Ferguson, in kicking to death in Los Angeles on April 10, 1962, a skid row inhabitant called "The Hook."

Defendants, Matthews, and Blonde were arrested in Los Angeles on May 20, 1962. The police began to question defendants on the day they were arrested and continued to do so for several months thereafter. They obtained numerous confessions concerning the murder of Fambro and the incidents occurring on the May trip to San Francisco. One officer estimated that he talked to defendant Gregg twenty times and to defendant Polk ten times. At the second penalty trial, a tape recording of one of Gregg's confessions, police testimony describing some of his other confessions, and police testimony describing Polk's confession to other crimes were admitted into evidence. Their testimony at the trial on the issue of guilt was also read into evidence.

Confessions are inadmissible if they were obtained when "(1) the investigation was no longer a general inquiry into an unsolved crime but had begun to focus on a particular suspect, (2) the suspect was in custody, (3) the authorities had carried out a process

of interrogations that lent itself to eliciting incriminating statements, (4) the authorities had not effectively informed defendant of his right to counsel or of his absolute right to remain silent, and no evidence establishes that he waived these rights." (People v. Dorado, 62 A.C. 350, 365; Escobedo v. Illinois, 378 U.S. 478.) The confessions were admitted into evidence at the second penalty trial in violation of this rule.

All the confessions admitted into evidence were made after defendants had been arrested. All were obtained during several months of persistent police interrogation designed to elicit incriminating statements about many crimes. "When the officers have arrested the suspect and the officers have undertaken a process of interrogation that lends itself to eliciting incriminating statements, the accusatory or critical stage has been reached and the suspect is entitled to counsel." (People v. Stewart, 62 A.C. 597, 603.) Even if this rule applied only when the investigation focused on defendants as the perpetrators of the crime to which they confessed, most of their confessions must be excluded. The first confession regarding the Fambro murder, the tape recording of defendant Gregg on June 2, begins: "George, in your own words . . . tell us as you told us before exactly what happened pertaining to this sailor boy." Similarly, Sergeant Brooks testified that defendant Polk's first statement about the killing of "The Hook" was obtained as follows: "I told him we were pretty sure that Jesse Ferguson had been involved and I was fairly certain that he was with Jesse when 'The Hook' was killed, and I asked if he was, and he said, 'Yes.'" Once the accusatory stage is reached the

accused is entitled to counsel. Any confession thereafter obtained must be excluded, and it is immaterial that the confession was different from what the police had expected. (Escobedo v. Illinois, 378 U.S. 478, 486.)

There is no evidence that defendants were at any time advised of their right to counsel or of their absolute right to remain silent, and we cannot presume that they were so advised. (People v. Stewart, supra, 62 A.C. 597, 607.) Accordingly, all the confessions should have been excluded. (People v. Dorado, 62 A.C. 350, 365.)

"The testimony of the psychiatrist describing defendants' admission to her and defendants' testimony at the trial on the issue of guilt that was read into evidence should also have been excluded. The psychiatrist interviewed each defendant twice at the request of the district attorney's office. She was thus an agent of the prosecution with no more right than any such agent to elicit admissions from defendants without their being informed of their rights. (See People v. Quinn, 61 Cal.2d 551.) The admissions of guilt of numerous crimes made to the psychiatrist should therefore have been excluded. (People v. Dorado, 62 A.C. 350, 365.)

Defendants' testimony at the trial on the issue of guilt was read into evidence in the second penalty trial. This testimony was the product of the confessions obtained in violation of Escobedo v. Illinois, 378 U.S. 478. At the trial on the issue of guilt, transcripts of some confessions, tape recordings of some, and police testimony describing others were admitted into evidence against both defendants. The defendants had no evidence but their own testimony to present

on their own behalf. Thus their failure to take the stand would have made verdicts of guilty certain after the prosecution's introduction of the numerous confessions.

Defendants therefore took the stand and again confessed, presumably hoping that the jury would find them guilty of a lesser offense than first degree murder.

Had the confessions been excluded, there would have been so little evidence against them as to obviate any need to take the stand to answer it.

Evidence obtained as a result of an involuntary confession must be excluded. (People v. Ditson, 57 Cal.2d 415, 439.) Testimony impelled by the introduction of illegally obtained evidence cannot be used to support a conviction. (People v. Davis, 62 A.C. ___, ___; People v. Ibarra, 60 Cal.2d 460, 463; People v. Dixon, 46 Cal.2d 456, 458; see also People v. Mickelson, 59 Cal.2d 448, 449.) Consequently, testimony impelled by the introduction of a confession obtained in violation of *Escobedo* must also be excluded at any subsequent trial.

There is no merit in the Attorney General's contention that even if the confessions were admitted in violation of *Escobedo,* their admission at the second penalty trial was not prejudicial. "*Any* substantial error in the penalty trial may have affected the result; it is 'reasonably probable' that in the absence of such error 'a result more favorable to the appealing party would have been reached.' " (People v. Hines, 61 Cal.2d 164, 169.) The admission of the statements to the police, the statements to the psychiatrist, and the testimony at the trial on the issue of guilt, all of which reiterated defendants' participation in the Fambro

killing and some of which disclosed other crimes that they had committed, was prejudicial error. The error was not rendered harmless by defendants' testimony at the second penalty trial (see Fahy v. Connecticut, 375 U.S. 89, 91), since that testimony was impelled, at least in part, by the introduction of the illegally obtained evidence. The prejudicial effect of the error as to Gregg is emphasized by the fact that the jury returned to the courtroom and requested that the instructions be given again, that Gregg's tape-recorded statement be replayed, and that parts of his testimony be re-read. The tape-recorded statement was considerably more prejudicial to defendant Gregg than the trial testimony, since in it he confessed to a more active role in the Fambro killing, that of holding Fambro's arms during the shooting and amputation. Accordingly, the judgments as to penalty must be reversed.

It is contended that since the confessions admitted into evidence at the trial on the issue of guilt were obtained in violation of *Dorado* and *Escobedo,* the judgments of guilt must also be reversed. We do not agree with this contention. Judgments that became final before *Escobedo,* as in this case, will not be reopened on the ground that confessions were admitted in violation of *Dorado* and *Escobedo.* (In re Lopez, 62 A.C. 380, 388.) Our affirmance of the judgments of guilt on the first appeal (People v. Polk, 61 Cal.2d 217, 234–235) made the judgments on that issue final judgments subject to immediate review by the United States Supreme Court. (Brady v. Maryland, 373 U.S. 83, 85.) If it appeared that despite the right to seek immediate review, the United States Supreme Court would treat the issue of guilt as still

open on a subsequent petition for certiorari, it would be pointless for us to refuse to reconsider it now. The United States Supreme Court has not held, however, that the finality of a judgment on the issue of guilt is not an adequate state ground for refusing to reopen that judgment to consider a federal claim based on *Escobedo*. We therefore conclude that an attack on the adjudication of guilt on this appeal is collateral and subject to the same limitation applicable to collateral attack by habeas corpus set forth in In re Lopez, 62 A.C. 380.

Since the judgments as to penalty must be reversed, we proceed to other contentions that will arise on the retrial of that issue.

In any future penalty trial, defendants' testimony at the second penalty trial will be inadmissible. That testimony was impelled, at least in part, by the admission of evidence obtained in violation of *Escobedo*. Just as defendants' testimony at the trial on the issue of guilt was inadmissible in the second penalty trial, the testimony at that trial is inadmissible hereafter.

Defendants contend that the trial court erred in failing to grant them separate penalty trials. We agree that the inability of a jury properly to limit a defendant's confession only to him is one of the factors that the trial court should consider in exercising its discretion to grant separate trials. Since the circumstances of the new trial will differ from that of the last trial, however, we cannot say that the trial judge will improperly decide defendants' motion for separate trials. (See Pen. Code, § 1098.)

Defendants contend that the introduction of a photograph depicting Fambro's body lying in the grass at the bottom of an embankment and of the victim's

bloody undershorts was prejudicial. The introduction of this evidence would be prejudicial if the danger of prejudice to the defendant outweighed its probative value. (People v. Henderson, 60 Cal.2d 482, 495.) The most inflammatory photographs were properly excluded, and the trial court did not abuse its discretion in holding that the remaining photographs and the undershorts were not unduly prejudicial. (People v. Arguello, 61 Cal.2d 210, 213; People v. Lindsey, 56 Cal.2d 324, 328.)

The district attorney argued to the jury that unless the death sentence was imposed, the defendants would get a "free ride" for the killing of Fambro and for other crimes. The trial court correctly ruled that such an argument is improper. "The district attorney . . . improperly discredited the Adult Authority by arguing that a life sentence for the murder would not increase defendant's punishment since he was already subject to a life term as the result of [other crimes], when it is clear that the sentencing authority would consider a first degree murder as a factor toward increasing the length of the total prison term." (People v. Treloar, 61 Cal.2d 544, 549.)

Defendants contend that since evidence of other crimes was introduced at the trial on the issue of penalty, an instruction that such crimes must be proved beyond a reasonable doubt should have been given. We agree with this contention. Generally, the standard of competency of the evidence at the trial on the issue of penalty is the same as the standard required at the trial on the issue of guilt. (People v. Hamilton, 60 Cal.2d 105, 129.) Since evidence of other crimes, however, may have a particularly damaging impact on the jury's determination whether the defendant

should be executed, we recognized in People v. Terry, 61 Cal.2d 137, 149 fn. 8, that there should be an exception to the normal standard of proof at the trial on the issue of penalty (People v. Purvis, 56 Cal.2d 93, 95). Thus, even though at the trial on the issue of guilt the jury must only be convinced that it is more probable than not that the defendant committed other crimes before it may consider them (People v. Albertson, 23 Cal.2d 550, 579, 581), at the trial on the issue of penalty they must be convinced beyond a reasonable doubt.

Finally, defendants contend that the trial court must instruct on the legal considerations that the jury should take into account when deciding whether the penalty should be death or life imprisonment. We do not agree that such an instruction is compulsory. The Legislature has entrusted to the absolute discretion of the jury the awesome decision between life imprisonment and the death penalty in first degree murder cases. (Pen. Code, § 190; People v. Green, 47 Cal.2d 209, 218.) The Legislature has thus indicated its belief that jurors understand the factors that are relevant to such a decision. Recitation of such factors by the trial court is therefore not essential. The trial court may, however, properly aid the jury by stating the kinds of factors that may be considered, thereby setting the tone for the jury's deliberation. (See People v. Friend, 47 Cal.2d 749, 767–768; Model Penal Code, § 201.6 (Proposed Official Draft 1962).) In this case, the trial court erroneously instructed that the jury cannot be influenced by "pity for the defendant" or "sympathy" for him. (CALJIC No. 1.) Although appropriate on the issue of guilt, this instruction improperly eliminates factors that a jury may consider

in fixing the punishment. (See People v. Friend, supra, 47 Cal.2d 749, 767–768.)

Since other questions raised are not likely to arise on retrial, we need not decide them here.

The judgments imposing the death penalty are reversed and the causes are remanded for retrial and redetermination of the question of penalty only.

TRAYNOR, C. J.

We concur:
PETERS, J.
TOBRINER, J.
PEEK, J.

PEOPLE v. POLK AND GREGG
Crim. 8312

DISSENTING OPINION OF BURKE, J.
TO
OPINION OF TRAYNOR, C. J.

I dissent from the reversal of the judgments imposing the death penalty upon these defendants.

Under the mandate of Penal Code section 190.1, a jury (for the second time) has reviewed, among other things, the circumstances surrounding the brutal murder of which defendants were convicted, and the background and history of defendants for the determination of the proper penalty. The review included evidence of the defendants' participation in a series of other crimes which were also marked by extreme brutality and by a complete lack of compassion or consideration for their victims. Faced with such a record, these juries, in the discharge of the solemn obligation imposed upon them by the legislative policy of this state of determining whether in their absolute discretion the penalty should be life imprisonment or death, imposed the maximum penalty.

In the face of the evidence it is inconceivable that the jury would have reached a result more favorable to the defendants had the errors complained of at the penalty trial not taken place. Such being the case, this court is precluded by our Constitution from reversing and remanding for a third trial on the issue of penalty. (Art. VI, § 4½.)

The majority opinion holds that it was error for the trial court not to have instructed the jury that, as to the other crimes concerning which evidence was intro-

duced, it must be proved beyond a reasonable doubt that the defendants committed them. The standard of competency of evidence at the trial on the issue of penalty has been declared by this court to be the same as at the trial on the issue of guilt. (*People* v. *Hamilton*, 60 Cal.2d 105, 129–131.) At the guilt phase all that is required is that the proof that the defendants committed such other crimes "be sufficient to arouse more than mere suspicion; it must afford 'substantial evidence' that the prior offense[s were] in fact committed by the defendant[s]. [Citations.]" (*People* v. *Albertson*, 23 Cal.2d 550, 579; *People* v. *Rosoto*, 58 Cal.2d 304, 331.)

In the instant case the majority have decreed that solely because "evidence of other crimes, . . . may have a particularly damaging impact on the jury's determination whether the defendant[s] should be executed . . . there should be an exception to the normal standard of proof at the trial on the issue of penalty." They declare that the new standard should be that the other crimes be proved beyond a reasonable doubt. This holding is directly contrary to the opinion of this court in *People* v. *Purvis*, 56 Cal.2d 93, 95–96, and to other cases.

In *Purvis* in a similar penalty trial the defendant had requested the trial court to instruct the jury that "in exercising its discretion as to the appropriate penalty it was to consider only facts proved beyond a reasonable doubt. . . . He also requested the court to instruct the jury that if it entertained a reasonable doubt as to which of the penalties to impose, the lesser penalty should be given." This court not only held unanimously that the trial "court properly refused to give the requested instructions" but further declared

(p. 96 of 56 Cal.2d), "The jury has absolute discretion in fixing the penalty and is not required to prefer one penalty over another. [Citations.] In evaluating the evidence the jury was bound by the instructions given as to the limited purpose for which certain evidence was admitted, but beyond that it could draw its own inferences, determine the probative weight of evidence, and select the appropriate penalty on the basis of its evaluation of the evidence. [Citations.]"

Thus in this case, as in *Purvis*, the fact that the death penalty is involved presents no adequate basis for imposing a higher standard of proof as to prior offenses at the trial on the issue of penalty than is required for the issue of guilt.

The majority rely solely upon dictum found in *People* v. *Terry*, 61 Cal.2d 137, 149, footnote 8. *Terry* cited no authority in support of the dictum and the dictum appears to be inconsistent with the further statement in the same footnote that "in the penalty trial the *same safeguards* should be accorded a defendant as those which protect him in the trial in which guilt is established." (Italics added.)

In *People* v. *Friend*, 47 Cal.2d 749, 767, cited by the majority in reference to factors which a jury may consider in fixing the punishment for first degree murder at life imprisonment or death, this court warned "that insofar as selecting the penalty is concerned (as between the two alternatives) the law does not itself prescribe, *nor authorize the court to innovate, any rule circumscribing the exercise of* [*the jury's*] *discretion*, but, rather, commits the whole matter of its exercise to the judgment and the consciences of the jury; . . ." (Italics added.) This admonition the majority now disregard by the innovation of a

special rule to govern the jury in its consideration of other crimes asserted to have been committed by the defendants.

I agree with the majority's conclusion that the judgments of guilt which became final before *Escobedo* v. *Illinois,* 378 U.S. 478, do not require reversal as a result of the admission into evidence at the trial on guilt of statements inadmissible under that decision. I would, however, as indicated, affirm the judgments imposing the death penalty.

BURKE, J.

We concur:
McCOMB, J.
SCHAUER, J.*

* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

APPENDIX C

IN THE

SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

THE PEOPLE,
Plaintiff and Respondent,
v.
RONALD HOWARD POLK, GEORGE ANTHONY GREGG, and AVERY MATTHEWS,
Defendants and Appellants.

Crim. Nos. 7356, 7513
FILED: Mar. 31, 1964

APPEALS [including two automatically taken under Pen. Code, § 1239, subd. (b)] from judgments of the Superior Court of Tulare County. John Locke, Judge. One judgment affirmed; other judgments affirmed in part and reversed in part.

Prosecution for conspiracy to kidnap for the purpose of robbery and for murder. Judgments of conviction of all defendants on conspiracy count affirmed; judgments of conviction of defendants Polk and Gregg on murder count imposing the death penalty reversed insofar as they relate to the penalty and in all other respects affirmed.

Claude O. Allen, Irving C. Sugarman and Ransome M. Smith, under appointment by the Supreme Court, for Defendants and Appellants.

Stanley Mosk, Attorney General, Doris H. Maier, Assistant Attorney General, and Edsel W. Haws,

Deputy Attorney General, for Plaintiff and Respondent.

THE COURT.—By jury verdicts defendants Polk, Gregg, and Matthews were found guilty of conspiracy to kidnap for the purpose of robbery, and Polk and Gregg were found guilty of first degree murder. On the latter count the jury fixed the penalty at death, and judgments were entered accordingly.[1] The appeals of Polk and Gregg are automatic (Pen. Code, § 1239, subd. (b)); that of Matthews is by notice duly filed.

By amended indictment defendants Polk, Gregg and Matthews, and one Jack Blonde, were charged in Count I with conspiring together on or about March 31, 1962, to kidnap for the purpose of robbery. As a first overt act it was alleged that defendants robbed William Fambro of a billfold on or about March 31, 1962; as a second overt act it was alleged that defendants and Blonde robbed Neil Schill of a billfold on or about May 18, 1962.

Count II of the indictment charged defendants with kidnaping Fambro for the purpose of robbery, and that the victim suffered bodily harm. Count III charged defendants with murdering Fambro. Count IV charged Matthews and Blonde with kidnaping Schill for the purpose of robbery, and that the victim suffered bodily harm.

Defendants' motions to set aside the indictment (Pen. Code, § 995) were denied, and each entered a plea of not guilty. Before the defendants had "gone into their defense" the indictment as against Blonde[2]

[1] On the conspiracy count all three defendants were sentenced to state prison for the term prescribed by law. (Pen. Code, §§ 182, 209.)

[2] In another proceeding Blonde had pleaded guilty to the robbery of Schill.

was dismissed pursuant to Penal Code section 1099, and he became a witness for the prosecution. Prior to empaneling the jury Counts II and IV of the indictment were dismissed as to all defendants therein charged on motion of the district attorney (Pen. Code, § 1385), and on the 13th day of trial the murder charge as against Matthews was dismissed.

On the remaining counts the jury found the defendants guilty as charged, determined the offense in Count III to be murder in the first degree, and fixed the penalty therefor at death. Motions by Polk and Gregg for new trial or for reduction of the penalty were heard and denied.

The evidence establishes the perpetration of a series of brutal crimes—kidnapings, assaults with a deadly weapon, armed robberies, and murder with mutilation of the victim—committed in concert by these defendants insofar as each has been found guilty of the respective charges. A résumé of the evidence follows:

Allen Cade testified that he first met the defendants in November 1961 and saw them occasionally thereafter. On the evening of March 30 or 31, 1962, Cade entered a restaurant in Los Angeles called the Dairy Lunch and saw Polk, Gregg and Matthews sitting at the tables. Polk approached him and asked to borrow 50 cents, then said, "I'm going to make me some money." When Cade inquired how he was going to do so, Polk said, "I got the stuff" and lifted up his shirt, revealing a revolver thrust under his belt. Gregg came up and repeated, "We going to get us some money." When Cade next saw Gregg, on the second morning following this conversation, Gregg was wearing a white sailor's hat.

During the last part of March 1962 William Fambro, a 20-year-old sailor, had been on leave with his family in Norwalk, California. He was to report to his ship in Bremerton, Washington, on the morning of April 1 or 2. At about 9 p.m. on March 30 his wife left him on Highway 99 beyond San Fernando, where he hoped to catch a ride to his ship. Before leaving he ate a banana sandwich; he was in uniform, including a white sailor's hat, and had about $20 in his wallet.

At 5:45 p.m. on April 2 Fambro's body was discovered down an embankment off Highway 65 in Tulare County. Footprints and other evidence at the scene indicated that two persons had carried the body to the shoulder of the road and thrown it over the embankment. Fambro's wallet was missing as was his white sailor's hat.

A post mortem examination showed the cause of death to be three bullet wounds, including one inflicted by a bullet passing through the heart. The pathologist testified that a person receiving the type of wounds sustained by Fambro would not die instantly but might live for several minutes. The bullet holes in the victim's jacket showed powder burns from the muzzle of the weapon; the path of the bullets through the body indicated that all three shots were fired from the same angle. At the time of the examination Fambro had been dead between 48 and 72 hours, and, based on the partially digested condition of the bananas in his stomach, it was the opinion of the pathologist that he had been killed no more than three or four hours after eating them.

The fly of Fambro's trousers had been ripped open and several buttons torn. The victim's penis was missing, having been "rather crudely amputated," leaving

a "ragged" wound. From the condition of the body, including the amount of blood found in the pubic area and on the victim's shorts, the pathologist concluded that Fambro had been alive at the time his penis was amputated in such a manner.

Jack Blonde testified that on the evening of May 15 or 16 he met Polk, Gregg and Matthews in the Dairy Lunch. They drove around in a 1953 Mercury, saw a drunk and decided to rob him. Matthews parked the car, Blonde threw the victim to the ground, and Polk "stomped" him by jumping on his chest with both feet. They took his wallet and watch and drove away. Thereafter they attempted to obtain a gun but were unsuccessful. The following night the four of them went walking, "looking for another person to rob." Polk and Gregg walked on one side of the street, Matthews and Blonde on the other. Blonde spotted a 1962 Pontiac station wagon following them, and Matthews told him to "act like a queen" (i.e., the "female" partner in a male homosexual relationship). The witness explained that this meant to walk "swishing" one's buttocks from side to side. The driver of the station wagon, a Mr. Delaney, stopped and picked up Blonde and Matthews. As they entered the car Blonde motioned for Polk and Gregg to follow, but the latter were unable to do so. After driving around in a pretended search for benzedrine, Matthews threw pepper in Delaney's eyes, and Blonde stabbed him four times in the chest. Delaney escaped from the car, but Matthews and Blonde chased him, knocked him down, kicked him several times, and tore his clothes looking for money. They then took his station wagon, returned to the Dairy Lunch and picked up Polk and Gregg, and stole a set of paper license plates for the car. Taking Johnny

Keyes with them, the five set out for San Francisco with Matthews driving. First they saw an old man with a cane, and selected him as a victim. Blonde, Polk and Matthews, the latter carrying an iron bar, got out of the car. Polk and Matthews grabbed the old man, the cane and iron bar flew through the air, and the man fell to the ground. The assailants ran back to the car with the victim's wallet and drove on.

Neil Schill, a paratrooper who was the victim of the kidnaping and robbery charged as the second overt act in Count I (conspiracy), testified that after midnight on the morning of May 17, 1962, he was hitchhiking on Highway 99 just north of Bakersfield when he was picked up by a new Pontiac station wagon. On entering the car he first saw only three people, two in the front and one in the middle seat; the driver appeared to be a woman, was wearing a woman's sweater, and was referred to as "her" by the others. After he got in, Schill heard someone stirring behind him and saw two men in the back seat. A few minutes later they pulled into a gas station to have the car's radiator serviced, and all but Schill went into an adjoining restaurant. Schill, who had not slept for two days, remained in the car and tried to sleep. In the restaurant it was decided to rob Schill, and Matthews emptied the pepper from a shaker on the table, rolled it in a napkin and put it in his pocket. On returning to the car Matthews and Polk entered the front seat, Gregg and Blonde entered the middle seat on either side of Schill, and Keyes got in the back.

Schill testified that shortly thereafter "we were driving along about eighty miles an hour and the woman—Matthews—said, 'Neil, do you know what

you can do for me?' And I said, 'No, what?' And he said, 'Well, you can start by taking all your clothes off.' And I said, 'Are you serious?' And at this time Blonde pulled a knife and held it in front of my face and said, 'Yes, she is serious, or else I'm going to cut you up.' " Schill grabbed the blade and twisted it away from Blonde; as he turned to do so, Gregg reached into Schill's back pocket and took his wallet. Then, as Schill described it, "everyone started to swing at me and kick at me, and I believe Polk had taken some pepper out of a glove compartment and rubbed it in my eyes." Matthews finally brought the car to a stop, and everyone except Schill scrambled out and took positions around the outside of the car, trying to keep all the doors shut but one. Matthews stood at the open door with a beer bottle in his hand, saying, "get the lead pipe." As Schill got out Matthews said to him, "Take your clothes off or else I'm going to smash you in the face." Schill lunged forward and Matthews hit him in the face with the bottle, breaking off a tooth and badly cutting his mouth. When Schill tried to get up Matthews kicked his feet out from under him. But Schill, bleeding heavily, managed to run across the highway and escape by flagging down a passing car.

Blonde testified that the five continued driving to San Francisco, having divided among them the contents of Schill's wallet and duffel bag. Keyes left the party in San Francisco, and the remaining four drove around the city "looking for somebody to rob." They saw a Mexican walking along the sidewalk and pulled him into the car. As they continued driving they robbed him of his watch and a ring, forced him to remove his clothes, and turned him out into the

street naked except for his socks. They found no more victims to rob in San Francisco, although they were "hoping for another one." On their return trip to Los Angeles they picked up a hitchhiking sailor, turned off the highway onto a side road, and robbed him of his money and the contents of his duffel bag.[3]

After arriving in Los Angeles Blonde and the three present defendants were arrested. A few days later all four made a joint statement to the police admitting the robbery of Delaney, the robbery of Schill, and the other robberies committed on their trip to San Francisco. The statement was tape-recorded and played to the jury.

Defendants and Blonde were also questioned regarding the robbery and murder of Fambro. In a series of statements all except Matthews admitted participating in these crimes. Each accused the others of actually pulling the trigger of the murder weapon and of amputating the victim's penis. Recordings of the statements were played or read to the jury. On June 3 Gregg took the police to the spot where Fambro was picked up outside of Bakersfield and pointed out the route taken to the approximate location where Fambro's body was found. On June 12 Gregg returned with the police to the murder scene and demonstrated how he and Polk threw Fambro's body over the embankment.

Each defendant took the witness stand and corroborated Schill's description of the crimes perpetrated

[3] The fifth member of the gang, Keyes, pleaded guilty to being an accessory to the robbery of Schill. He testified for the prosecution, and his descriptions of the robbery of the old man with a cane and the robbery and kidnaping of Schill were materially identical with the testimony of Blonde and of Schill himself.

against Schill,[4] as well as Blonde's testimony concerning the other robberies on the trip to San Francisco.

As to the events surrounding the murder, Polk testified that he and Gregg met at a Los Angeles restaurant on the evening of March 30 or 31, and agreed that they needed money. Polk suggested that they "pull some jobs together"; Gregg asked, "What kind of jobs?" and Polk replied, "Service stations and liquor stores." Gregg agreed, and Polk went out and stole a car and obtained a gun from his apartment. As he drove away with Gregg he said that they were not going to pull any "jobs" around Los Angeles because it was "too hot" there but that they would head north to do so. Polk then testified that they "looked over a few places in San Fernando but the police was too hot out there"; that they then "cased a few places in Bakersfield that we thought we could hit about closing time," but found no satisfactory victims; that they continued north on Highway 99 looking for something to "knock over" when they saw Fambro hitchhiking and stopped to pick him up. Polk's story was that Gregg and Fambro began arguing about how long it took Gregg to become a sergeant in the service; that Fambro then drew Polk into the argument and called him dirty names; that Polk stopped the car, began fighting with Fambro in the back seat, then pulled out his gun and shot Fambro three times. Polk further testified that as they were dragging Fambro out of the car Gregg took Fambro's wallet and amputated his penis.

Gregg testified that he and Polk were alone in the car when they saw Fambro, and that Polk said, "That's one we can get right there." Gregg further testified that there was no argument between them and Fambro but that after they turned off Highway 99 he

[4] In separate proceedings Polk and Gregg had each pleaded guilty to the robbery of Schill.

demanded Fambro's wallet; that Fambro complied, and Polk then shot him without warning; and that Polk amputated Fambro's penis as they were dragging him from the car.

[1] It is contended that in the *voir dire* examination of prospective jurors the district attorney committed prejudicial misconduct by expressing his "personal opinion," not based on the evidence, as to the proper penalty. It is apparent, however, that the prosecutor merely told the prospective jurors that, on the basis of what he anticipated the evidence yet to be presented would show, he expected to ask for the death penalty should the trial reach that stage. This was not improper. (*People* v. *Spencer,* 60 Cal.2d 64, 74-76 [31 Cal.Rptr. 782, 383 P.2d 134]; *People* v. *Pike*, 58 Cal.2d 70, 88 [22 Cal. (Rptr.) 664, 372 P.2d 656].)

[2] Complaint is also made of references in the district attorney's opening statement to the fact that Matthews was a homosexual. The point is without merit. The references were fully substantiated by the testimony of Cade, Schill, and others, and Matthews himself stated on the witness stand that he was a "queen." Such testimony was relevant to the issue of the acquaintance of the charged coconspirators with each other and the similarity of their modus operandi as evidence of a continuing conspiracy.

(3) The principal assignments of error and misconduct advanced by all three defendants arise out of the dismissal of the murder count as to Matthews on the 13th day of trial, December 28, 1962. The district attorney stated in open court that Los Angeles County Jail records had recently come to his attention showing that Matthews had been incarcerated be-

tween March 20, 1962, and 4:45 p.m. on March 31, 1962. On that basis the district attorney declared that the prosecution entertained a reasonable doubt that Matthews was present at the time Fambro was killed, and accordingly moved to dismiss the murder count as to Matthews.[5] The court granted the motion "in

[5] The relevant proceedings were as follows:

"The Court: I think we'll take an adjournment, but all the spectators in the back of the room will remain seated or where you are standing until the jury has left the courthouse and until you are excused by the officer in the rear.

"Mr. Ballantyne (the district attorney): If the Court please, the People have a motion they would like to address to the Court at this time.

"The Court: Before we adjourn?

Mr. Ballantyne: Yes, Your Honor. May I make the motion now, your Honor.

"Mr. Bradley (counsel for Polk): Is this something that can be made in the presence of the jury?

"Mr. Ballantyne: No, I want the jury to hear it, Counsel.

"The Court: Just a minute, Mr. Ballantyne.

"(Short off record discussion between Mr. Ballantyne and defense counsel.)

"Mr. Ballantyne: If the Court please, I stated on voir dire examination, I took an unequivocal position at that time as to the position of the People with reference to the defendants and my feeling that it was a capital case. I did state at that time, Your Honor, that certainly my mind remained open and the jurors should consider any new evidence that should come in. At the very beginning of this case, Your Honor, the first thing that they do is to check in Los Angeles when someone is picked up on a serious crime, to check the jail to ascertain whether or not any of the suspects were in custody at the time that the crime took place. This was done by Sergeant Brooks when he came into the case, and also by Lawrence John of the Tulare County Sheriff's office. Now, at that time they were informed by the Records Division of the jail that all of the defendants were clear as of the time that the crime occurred.

"The Court: By clear you mean they were not in jail?

"Mr. Ballantyne: They were not in jail, that's correct, Your Honor. And on the face of the record on Matthews appears the date 3/20/62. He was picked up on 3/20/62 on a masquerading charge, a disturbing the peace charge, and—or it was a masquerading charge. And apparently the clerk overlooked a part of the

record at that time. Now, Sergeant Brooks—during the course of the trial I requested him to check his records on alibi and he was checking the field interrogation records on Christmas Day, and in doing so he noted again that the defendant Matthews had been in jail on 3/20 and he made a phone call to the jail to verify how many days he had been in jail. At that time he was informed that the defendant Matthews was actually released on 3/31/62. Now, at that time Sergeant Brooks immediately went to the Records office himself, thinking there was a mistake, and obtained the record. The record indicates, Your Honor, that Matthews was in jail from 3/20/62 until 3/31/62 at 4:45 P.M. in the afternoon. Now, Your Honor—

"The Court: There can be no mistake about the time?

"Mr. Ballantyne: There can be—there is the possibility always of a mistake, Your Honor. This is a routine, it is done almost by reflex when the man is released from jail. It bears the stamp, it's a time stamp when the man is bailed out.

"Mr. Price (counsel for Matthews): I made a similar inquiry just last night on the phone and there has been some partial verification but we hadn't been able to get the record yet because of the necessary steps.

"Mr. Ballantyne: Now, Your Honor, this was brought to my attention immediately by Officer Brooks, and I want to state that I think in the finest traditions of law enforcement this was called to my attention by this very fine officer. This was called to my attention at 10:00 o'clock on the 25th of December. The next morning I immediately called this to the attention of the Court, as the Court knows, and I stated my intention, that I intended to bring this out before the matter was submitted to the jury. I think it's the most important function of law enforcement and the District Attorney's office to, first of all, protect the innocent. Now, at this time, Your Honor, there is a reasonable doubt in my mind that the defendant Matthews was present at the time Fambro was killed. And I'm not predicating that statement upon the statement of this witness—I have some serious reservations about that.

"Mr. Bradley: If the Court please, I am going to object to that.

"Mr. Ballantyne: I withdraw that statement.

"The Court: The jury is admonished to disregard the last statement made by the District Attorney.

"Mr. Bradley: If he wants to make his motion I feel he should, but I don't think he should try to argue the case.

"Mr. Ballantyne: Yes. Counsel, I wanted to make my case clear on that. There is no reflection on the witness. I am not predicating my position, Your Honor, on the testimony of this witness, I am predicating it upon the document which is documentary proof; it satisfies the People that there is a reasonable doubt as to the complicity of Matthews in the Fambro murder. So at this time I would

the interests of justice." A motion for mistrial by all three defendants was thereafter argued in the absence of the jury and denied.

Gregg points out that he had begun to testify before the dismissal of Count III as to Matthews took place, and contends that such dismissal therefore violated Penal Code section 1099, which provides that "When two or more defendants are included in the same accusatory pleading, the court may, at any time before the defendants have gone into their defense, on the application of the prosecuting attorney, direct any defendant to be discharged, that he may be a witness for the people." That section, however, is not applicable here. The murder charge against Matthews was not dismissed to grant him immunity so that he might be a witness for the People (Pen. Code, §1099); Matthews was never called as such a witness. Rather, the charge was expressly dismissed "in the interests of justice," i.e., under Penal Code section 1385, which provides that "The court may, either of its own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons of the dismissal must be set forth in an order entered upon the minutes." A motion under this section is not subject to the limitation that it must be made before the defendants have gone into their defense.

Polk and Gregg contend that it was prejudicial misconduct for the district attorney to make his motion to dismiss in the presence of the jury and to accompany it with the remarks quoted above (*ante*, fn.

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like to offer this record in evidence and predicated upon this record, Your Honor, I would like to move for the dismissal of Avery Matthews of Count III of the indictment, which involves the murder of Fambro, in the furtherance of justice."

5). They argue that the district attorney in effect expressed personal belief in their guilt of murder, since they were the sole remaining defendants charged with that crime.

The record refutes this contention. At the outset of their investigation the police had been informed by the Records Division of the Los Angeles County Jail that none of these defendants had been in custody at the time of the murder. Nevertheless, during the course of he trial the district attorney requested Officer Brooks to recheck the relevant jail records. The officer did so and discovered that according to a time stamp on the records of the Los Angeles County Jail Matthews had been in custody until 4:45 p.m. on March 31, 1962. This jail record appears to have been as much a surprise to Matthews' counsel as to the district attorney, for counsel told the court that he had just "made a similar inquiry" and "there has been some partial verification" of the fact. The dilemma then facing the district attorney may easily be seen: much of the evidence that he had amassed prior to trial tended to establish the presence of Matthews at the scene of the murder. Moreover, the jail record was not conclusive proof of Matthews' innocence. Not only was there the possibility of mistake in the routine use of the time stamp on jail releases (as the district attorney stated to the court), but under the medical evidence it was possible that the murder had occurred after 4:45 p.m. on March 31.[6]

[6] In support of the latter possibility defendants introduced evidence showing that Fambro's watch was running when it was removed from the body at the post mortem examination, and that it then indicated the correct time (9:50 p.m. on April 2, 1962); that the watch did not run down until 7:53 a.m. on April 3; and that it had a 48-hour period of operation.

The meaning and relevance of the discovery of the jail record were therefore not so obvious at the time as defendants would now have us believe. It was not unreasonable for the district attorney, having promptly informed the court of the discovery, to continue to present his case and to await further evidential developments. When, however, Gregg subsequently took the stand and gave testimony in complete accord with the jail record, disclaiming Matthews' presence at the murder scene, it was not unreasonable for the district attorney to conclude that an appropriate case had arisen for a motion to dismiss under Penal Code section 1385. Although the proof of Matthews' innocence is not conclusive, the evidence is sufficient to raise a reasonable doubt as to his complicity in the murder. It was therefore proper for the district attorney to move for a dismissal.

The motion was not the equivalent of an expression by the district attorney of personal belief in Polk's and Gregg's guilt of murder. The record shows that the district attorney's statements were based upon his analysis of the evidence. As the trial court observed in denying defendants' motion for mistrial, it was proper for the jury to know of the dismissal and the reason therefor. (See *People* v. *Frahm,* 107 Call.App. 253, 262 [290 P. 678].) In the preceding 12 days of trial the jurors had heard a significant amount of testimony linking Matthews to the murder; due regard for the orderliness of their subsequent deliberations required their being informed as to the dismissal of the murder count against him. Polk and Gregg complain, however, that the motion to dismiss should not have been made in the presence of the jury. It would have been better practice had the motion been made

and ruled on in the absence of the jury, and such a course should be followed if the situation again presents itself. (*People* v. *Alverson*, 60 Cal.2d 803, 807 [36 Cal.Rptr. 479, 388 P.2d 711].) In the present case the sequence of events was a novel one. When the district attorney undertook to make his motion in the presence of the jury there was no formal objection or opposition by counsel for defendants.[7] There is no showing of bad faith on the part of the prosecutor. In the circumstances no prejudicial misconduct appears.[8]

Matthews contends that after the dismissal the trial court abused its discretion in failing to declare a mistrial as to him on the ground that it was improper to proceed with a joint trial of all defendants on the conspiracy count and of only Polk and Gregg on the murder count. In support, it is argued that as an original matter it would have been improper to undertake a joint trial of such defendants on such counts. That premise, however, is untenable. Section 954 of the Penal Code permits joinder of "two or more different offenses connected together in their commission," and such joinder is allowable even though the offenses charged "do not relate to the same transaction and were committed at different times and places and against different victims, where there is a common element of substantial importance in their commis-

[7] Indeed, after the court admonished the jury to disregard the district attorney's remark as to the credibility of Gregg, counsel for Polk said, "*If he wants to make his motion I feel he should,* but I don't think he should try to argue the case." (Italics added.)

[8] For similar reasons there is no merit in Matthews' argument that by dismissing the murder count against him the district attorney in effect expressed personal belief in his guilt on the remaining count, conspiracy.

sion." (*People* v. *Chessman,* 52 Cal.2d 467, 492 [341 P.2d 679], and cases there cited; accord, *People* v. *Pike, supra,* 58 Cal.2d 70, 84; *People* v. *Kemp,* 55 Cal.2d 458, 475 [11 Cal.Rptr. 361, 359 P.2d 913].)

Here a common element of substantial importance clearly appears, as the robbery-murder charged in Count III was the first overt act of the conspiracy charged in Count I. Moreover, there can be no doubt that Matthews was properly charged as a joint defendant with Polk and Gregg in Count I, under Penal Code section 1098 which provides: "When two or more defendants are jointly charged with any public offense, . . . they must be tried jointly, unless the court order separate trials." Accordingly, even if Matthews had not been charged on the murder count as an original matter, that fact would not have rendered the joinder improper or deprive the court of discretion to deny a motion for severance since there were a joint charge as to the conspiracy and a common element of substantial importance in the commission of all the crimes. (*People* v. *Chapman,* 52 Cal.2d 95, 97 [338 P.2d 428], and cases there cited; accord, *People* v. *Pike, supra,* 58 Cal.2d 70, 85.) Throughout the proceedings the court took pains to keep the jury instructed as to which evidence was limited to which defendant; and on the conspiracy count, of course, the jury was specifically instructed to disregard as to Matthews the allegations of the first overt act (robbery of Fambro). No abuse of discretion is shown in the denial of Matthews' motion for mistrial.

Matthews complains that earlier in the trial the court allowed into evidence against him the transcript of a statement given by Polk to the police

implicating Matthews in the murder of Fambro and the various robberies committed on the trip to San Francisco between May 17 and May 19, 1962. Matthews concedes that he was present when this statement was made, but argues that he was not afforded an opportunity to deny the accusations against him. (Cf. *People* v. *Briggs,* 58 Cal.2d 385, 407-409 [24 Cal. Rptr. 417, 374 P.2d 257].) The argument lacks factual support. The record shows that on this issue the officer taking the statement testified as follows: "Q. [by the district attorney] Now, when Matthews was brought into the room at the time of the confrontation and the accusation by Mr. Polk, was he told at that time he could not make denials? A. No, sir, he was not." Matthews now argues that he was not "allowed" to interrupt. However, prior to putting it before the jury the court listened to a tape recording of the statement and read the transcript thereof. The district attorney pointed out that after the accusations were concluded, approximately half a minute elapsed (before Matthews was returned to his cell) during which time he made no denials whatever; and that on the occasion of a joint statement taken a month earlier (a tape recording of which had also been played to the court) Matthews had shown repeatedly that he was not in the least afraid to interrupt and criticize statements of a codefendant.

In these premises the court did not err in allowing the subject evidence to go to the jury for their consideration. (See *People* v. *Davis,* 43 Cal.2d 661, 670 [276 P.2d 801], cert. den. 349 U.S. 905 [75 S.Ct. 581, 99 L.Ed. 1241]; *People* v. *Yeager,* 194 Cal. 452, 486 [229 P. 40]; Code Civ. Proc., § 1870, subd. 3.) At the time of ruling, the court instructed the jury on the

factual elements necessary to constitute an implied admission, and correctly admonished them that "If, however, in weighing the conduct or the answer or lack of answer, if you weigh that and find it doesn't really constitute an implied admission of guilt, then, of course, you disregard the accusation, and you would, of course, also disregard the answer or conduct in relation to the accusation." This admonition was repeated by the court after the reading of the transcript to the jury, and a formal instruction to the same effect was later given.

It is asserted that the evidence does not support the jury's finding of a continuing conspiracy among all the named defendants. The record refutes this contention. It was the People's theory, after discovery of the jail records showing that Matthews was incarcerated until 4:45 p.m. on March 31, that on the evening of March 30 Polk and Gregg conspired to commit kidnapings for the purpose of robbery; that the robbery of Fambro was an overt act in furtherance of that conspiracy; that on or about May 15 Matthews and Blonde joined the conspiracy; and that the robbery of Schill was another overt act in furtherance of the same conspiracy.

It is unnecessary to repeat here all the evidence set forth above which supports that theory and from which the jury could properly infer the existence of such a continuing conspiracy between these defendants; it will be enough to refer to some of the more salient points of that evidence. Polk himself testified to the discussion he had with Gregg at the Dairy Lunch on March 30 concerning their need for money and their agreement to "pull some jobs together" in

areas other than Los Angeles.[9] Polk further described how they drove around San Fernando and Bakersfield looking for victims to rob. Gregg testified that on spotting Fambro hitchhiking on Highway 99 Polk said, "That's one we can get right there." Polk and Gregg met again at the Dairy Lunch on May 15 or 16 and further discussed their need for money, this time with Matthews, Blonde, and others. They agreed to drive around looking for a place to rob (as Polk and Gregg had done on March 30), and then robbed a drunk on the sidewalk. The following night Polk, Gregg, Matthews, and Blonde went "out looking for another person to rob." Matthews entered Delaney's station wagon, and Blonde motioned to Polk and Gregg to follow them. They all returned to the Dairy Lunch, and agreed to drive together towards San Francisco. In this connection Blonde testified: "Well, we discussed it before we left [for] Frisco, about picking up hitchhikers. Q. What were you going to

[9] Polk stresses the fact that the witness Cade testified that Matthews was also present on this occasion and that the defendants were in the process of doping the coffee of a "queen" to obtain "her" car for the purpose of using it to commit robberies. Polk argues that this testimony was later shown to be erroneous by the introduction of the jail record relating to Matthews' incarceration on March 30 and that it was therefore prejudicial error not to strike all of Cade's testimony in this respect. However, Polk testified that Cade was present when he met with Gregg at the Dairy Lunch on or about March 30, and Matthews testified that Cade was present at a meeting of Polk, Gregg, Blonde, and himself at the Dairy Lunch on or about May 15 at which they were in the process of doping a "queen" to obtain "her" car for the purpose of committing robberies. The district attorney argued to the jury that in the eight or nine months between these events and the trial Cade had become confused and had consolidated the two occasions in his memory. The argument was a plausible one, and the apparent discrepancy as to dates went only to the weight of Cade's testimony.

do? A. Rob them." As noted all three defendants admitted the series of robberies committed by them on the San Francisco trip, in each of which the same modus operandi was used: the defendants spotted their victim while driving along, and stopped and picked him up; acting as a team, they then sat him between them rather than by the door, threatened him with bodily harm, and robbed him. The foregoing evidence amply supports the verdict on the conspiracy count.

During the penalty trial the People called to the stand a psychiatrist, Dr. Colett, who had conducted psychiatric examinations of Polk and Gregg after their arrest. Dr. Colett testified that each defendant committed his various crimes "for kicks" and for money; that neither defendant showed any signs of remorse, but was only concerned about what would happen to himself; that each was habitually antisocial in nature and unable to learn by experience. On the basis of her examination Dr. Colett concluded that each defendant was a severe sociopath whose chances of rehabilitation were "extremely improbable." It is argued that Dr. Colett's conclusion coincided with one of the ultimate facts in issue. Even assuming it did, an expert opinion is not inadmissible merely because it coincides with an ultimate issue of fact. (See e.g., *People* v. *Cole*, 47 Cal.2d 99, 105 [301 P.2d 854, 56 A.L.R.2d 1435], and cases there cited.)

We have concluded that prejudicial error occurred in the penalty trial. The prosecutor made an argument and the court gave an instruction similar to the ones which we condemned in *People* v. *Morse*, 60 Cal.2d 631 [36 Cal.Rptr. 201, 388 P.2d 33].

The district attorney in his concluding argument to the jury stated, "Now, Mr. Donahue [attorney for Gregg] brought out the fact that under our system the Adult Authority, if you sentenced these men to life imprisonment has the power to parole, and you will be instructed that after 7 calendar years these men, if given a life sentence, could be placed back on the streets of our society. Now, I'm not saying that they would do this, it might be a few more years, but they could, and the Adult Authority are made up of political appointees, they administer to all of the prisons, these few men, to all of the prisons in the Department of Corrections in the State of California, thousands of cases, and, remember, they can make mistakes. They didn't sit through these proceedings and hear this evidence. It gets rather distant, the farther you get from the situation, as to what happened to Mr. Fambro. Are they going to be terribly concerned about that incident 8 or 10 years from now? Are they going to take a chance and turn these men back on the streets? Now Dr. Colett says that they cannot be rehabilitated, she has told us that the best type of therapy known and used today is group therapy. Gregg can gravitate toward the strongest members of the group, and I submit that the strongest members in a group in a prison population are the toughest and most vicious; that Polk is an impulsive, sadistic type that can never change, but they can fool people and they might place them back on the street, and I tell you this: This is the responsibility of this jury and this cannot be passed on to anyone else to see that this does not happen, and that requires a punishment of finality in order to protect society, and that

is the responsibility of this jury, because by giving a life sentence to these Defendants you indicate that you feel that they can be rehabilitated, and possibly the Adult Authority should take a chance."

The court instructed the jury in part as follows: "In making your determination as to the penalty to be imposed, you may, in exercising your discretion to choose between different punishments, consider as a possible consequence that the law of this State provides that a defendant sentenced either to death or life imprisonment may be pardoned or have his sentence reduced by the Governor and that a prisoner serving a life sentence may be eligible for parole. A trial judge may also reduce the penalty from death to life imprisonment. . . . You are instructed that a prisoner imprisoned under a life sentence, may be paroled after he has served seven calendar years."

These errors must be deemed to be prejudicial. In the recent case of *People* v. *Hines, ante,* p. 164 [37 Cal.Rptr. 622, 390 P.2d 398], we clarified the tests for determining prejudicial error in the penalty trial. We said in *Hines,* "Our sole inquiry here devolves into a determination of whether substantial error, that is, substantial deviation from the standards established in *Morse,* has occurred." *Ante,* at p. 170. The instructions and argument in the instant case, as in *Hines,* unquestionably constituted substantial deviation from the standards established in *Morse.* Thus, prejudicial error occurred in the penalty trial.

The judgments as to Polk and Gregg are reversed insofar as they relate to the penalty for first degree murder. In all other respects the judgments as to Polk and Gregg are affirmed. The judgment as to Matthews is affirmed.

SCHAUER, J., Concurring and Dessenting,—Obedient to the mandate of article VI, section 4½, of the California Constitution I have made "an examination of the entire cause, including the evidence," and am of the opinion that it is not reasonably probable that a result more favorable to defendants Polk and Gregg would have been reached in the absence of error committed on the penalty phase.

Accordingly, on the record in this case, and for all the reasons explained and documented in my concurring and dissenting opinion in *People* v. *Hines* (1964) *ante*, p. 175 [37 Cal.Rptr. 622, 390 P.2d 398], I dissent from the judgment of reversal and would affirm in its entirety each of the judgments of the trial court.

McComb, J., concurred.

The petition of appellant Matthews for a rehearing was denied April 29, 1964.

APPENDIX D

TITLE 28—UNITED STATES CODE

§ 1257. State courts; appeal; certiorari.

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. (June 25, 1948, ch. 646, 62 Stat. 929.)

APPENDIX E

UNITED STATES SUPREME COURT RULES

Rule 22. Review on Certiorari—Time for Petitioning

1. A petition for writ of certiorari to review the judgment of a state court of last resort in a criminal case shall be deemed in time when it and the certified record required by Rule 21 are filed with the clerk within ninety days after the entry of such judgment. A justice of this court, for good cause shown, may extend the time for applying for a writ of certiorari in such cases for a period not exceeding sixty days.

APPENDIX F

California Rules of Court

Rule 24. Decision of reviewing court

(a) [When decisions become final] All decisions of the reviewing courts shall be filed with the clerk *who shall forthwith transmit a copy of the opinion to the lower court or tribunal and to the parties.* A decision of the Supreme Court becomes final 30 days after filing unless prior to the expiration of said 30-day period either a shorter time, or an additional period of time not to exceed 30 days, is ordered by the court. A decision of a District Court of Appeal becomes final as to that court 30 days after filing, except that the decision becomes final as to that court immediately after filing upon the denial of a petition for a writ within its original jurisdiction without issuance of an alternative writ or order to show cause or the denial of a transfer to a District Court of Appeal after certification in a case within the original jurisdiction of a municipal or justice court. When a decision of a District Court of Appeal is final as to said court, it is not thereafter subject to modification or rehearing by said court. Where an opinion is modified without change in the judgment, during the time allowed for rehearing, such modification shall not postpone the time that the decision becomes final as above provided; but if the judgment is modified during that time, the period specified herein begins to run anew, as of the date of modification. [*As amended effective July 1, 1963; previously amended effective Jan. 1, 1957, Jan. 1, 1959, Jan. 1, 1961, and Jan. 2, 1962.*]

(b) [Filing consent to modification] If the reviewing court orders that a judgment be reversed and a

new trial granted or that, in the alternative, the judgment be affirmed on condition that the party in whose favor judgment has been rendered consent to a remission of a portion thereof, or on condition that the party against whom the judgment has been rendered consent to an addition thereto, then, unless otherwise ordered, the judgment of reversal and granting of a new trial shall become final unless within 30 days after the filing of the decision two copies of a written consent by such party to the remission or addition shall be filed in the reviewing court. One of the copies shall be transmitted with the remittitur to the superior court.

Rule 25. Remittitur

(a) [Issuance and transmission] A remittitur shall issue after the final determination of any appeal, or of any original proceeding in review in which an alternative writ or order to show cause has been issued. Unless otherwise ordered, the clerk of the Supreme Court shall issue the remittitur when a judgment of that court becomes final, and the clerk of a District Court of Appeal shall issue the remittitur upon the expiration of the period during which a hearing in the Supreme Court may be determined, including any extension of such period granted in the particular cause. The remittitur shall be deemed issued on the clerk's entry thereof in the register, and shall be transmitted immediately, with a certified copy of the opinion, to the lower court or tribunal. [*As amended effective Jan. 1, 1961; previously amended effective Jan. 1, 1957.*]

(b) [Issuance forthwith] For good cause shown, or on stipulation of the parties, the Supreme Court may

direct the immediate issuance of a remittitur. The District Court of Appeal may direct the immediate issuance of a remittitur on stipulation of the parties.

(c) [Stay of issuance] A reviewing court, for good cause, may stay the issuance of a remittitur for a reasonable period.

(d) [Recall of remittitur] A remittitur may be recalled by order of the reviewing court on its own motion, on motion or petition after notice supported by affidavits, or on stipulation setting forth facts which would justify the granting of a motion. [*As amended effective Jan. 1, 1951.*]

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